The 69th Mineral Law Institute



Continuing Legal Education

This schedule is clickable. Click the session title to jump to the beginning of the session materials.

The 69th Mineral Law Institute March 31, 2022 – April 1, 2022

	Thursday, March 31, 2022					
	8:30 AM - 8:55 AM	Check-in/Conference Opening	(Breakfast Provided)			
	8:55 AM - 9:00 AM	Introductory Remarks				
0.75 hr.	9:00 AM - 9:45 AM	Recent Developments in Louisiana Mineral Law W. Drew Burnham - Cook, Yancey, King & Galloway, APLC, Shreveport				
0.75 hr. 9:45 AM - 10:30 AM		Comparing Louisiana and Texas Remedies for Improper Lease Administration James "Jimmy" H. Dupuis, Jr. – Dupuis Law Firm, PLLC, The Woodlands, TX				
	10:30 AM - 10:40 AM	BREAK				
1.0 hr.	10:40 AM - 11:40 AM	Prices Go Up, Prices Go Down: The Effect of Volatile Market Conditions on a Production in "Paying Quantities" Analysis Patrick S. Ottinger - Ottinger Hebert, LLC, Lafayette				
0.50 hr.	11:40 AM - 12:10 PM	So, You Want to Drill Your Own Oil Well? - An Oil and C Frank N. Cusimano, III – Attorney at Law, Houston, TX	Gas Drilling Primer			
	12:10 PM - 1:05 PM	LUNCH (provided)				
1.0 hr.	1:05 PM - 2:05 PM	Spill and Emergency Response: An Overview of State Ageneriting and Remediation Requirements Gavin D. Broussard – Louisiana Department of Natural Rejerry Lang – Louisiana Department of Environmental Qua Moderator: David K. McCrory – Ottinger Hebert, LLC, Laf	gency Relationships, esources ality ayette			
	2:05 PM – 2:10 PM	BREAK				
1.0 hr.	2:10 PM - 3:10 PM	Current Trends in Renewable Project Development Sarah Y. Dicharry - Jones Walker LLP, New Orleans Justin J. Marocco – Jones Walker LLP, Baton Rouge Seth A. Levine - Jones Walker LLP, New Orleans				
0.75 hr.	3:10 PM - 4:00 PM	In-House Counsel Perspective Russell Buehrle - GeoSouthern Energy Corporation, The Thomas Charles "T.C." Turner Jr Stronghold Resource F Peter A. Vermillion – Chesapeake Energy Corporation, O Moderator: Sara M. Glover - Arnold & Porter, Denver, CO	Woodlands, TX Partners, LLC, Dallas TX klahoma City, OK D			
	4:00 PM – 4:10 PM	BREAK				
1.0 hr.	4:10 PM – 5:10 PM	Restrictions on Assignments—Consent-to-Assign Aimee W. Hebert - Kelly Hart & Pitre, New Orleans				



The 69th Mineral Law Institute March 31, 2022 – April 1, 2022

Friday, April 1, 2022					
	8:30 AM - 8:55 AM	Check-in/Conference Opening	(Breakfast Provided)		
	8:55 AM - 9:00 AM	Introductory Remarks			
1.0 hr.	9:00 AM - 10:00 AM	Professionalism H. Minor Pipes, III - Pipes Miles Beckman, LLC, New Orlean President, Louisiana State Bar Association	IS		
1.0 hr.	10:00 AM - 11:00 AM	1 Ethics (Recent Developments in Ethics Law) Professor Lisa R. Avalos – LSU Law Center			
	11:00 AM - 11:10 AM	BREAK			
1.0 hr.	11:10 AM - 12:10 PM	Carbon Capture Regulation Tyler P. Gray - Placid Refining Company, Port Allen Colleen C. Jarrott - Baker, Donelson, Bearman, Caldwell & Orleans	Berkowitz, PC, New		
	12:10 PM - 12:55 PM	LUNCH (provided)			
1.0 hr.	12:55 PM - 1:55 PM	State Administration/Preemption vs. Local Regulation of Donna Y. Frazier – Caddo Parish Attorney, Shreveport Christopher Lento – Louisiana Attorney General's Office, B	Mineral Exploration		
	1:55 PM – 2:05 PM	BREAK			
0.75 hr.	2:05 PM – 2:50 PM	Supreme Court Showdown: Legacy and Related Citizen Su Erin E. Bambrick - Liskow & Lewis, APLC, New Orleans Jane A. Jackson - Kelly Hart & Pitre, New Orleans	uits Update		
1.0 hr.	2:50 PM – 3:50 PM	Regulatory Comparison—Louisiana vs. Texas Robert G. "Rob" Hargrove - Davis, Gerald & Cremer, P.C., Austin, TX Scott R. Patton - Patton Law Firm, LLC, Baton Rouge			

Conference CLE Credits:				
Day 1	6.75 hrs			
Day 2	5.75 hrs			
Full Conference	12.5 hrs			



SPEAKER BIOGRAPHIES

PROFESSOR LISA AVALOS is Associate Professor of Law and holds the Hermann Moyse, Sr. Professorship at Louisiana State University Paul M. Hebert Law Center, where she has taught since 2018, primarily in the areas of criminal law and procedure, sex crimes, and professional ethics. Much of her scholarship addresses gender-based violence and has appeared in the Brooklyn Law Review, Nevada Law Journal, Michigan Journal of Gender & Law, Vanderbilt Journal of Transnational Law, Fordham International Law Journal, and others. She has written opinion pieces for the Guardian, appeared on BBC Radio and Louisiana Public Radio, and has been quoted in numerous publications including the Guardian, Huffington Post, Time Magazine, BuzzFeed, Cosmopolitan, and Vice News. She earned her J.D. at New York University School of Law and holds a Ph.D. from Northwestern University.

ERIN E. BAMBRICK is a shareholder practicing in the New Orleans office of Liskow & Lewis where her focus is energy and environmental law. She represents a variety of oil and gas clients in both state and federal court, with a concentration on legacy lawsuits, coastal land loss issues, and NORM litigation.

GAVIN BROUSSARD joined the Department of Natural Resources, Office of Conservation's Engineering group in 2015. He currently serves as the Office of Conservation's Inspection and Enforcement section manager. Before working for DNR, Mr. Broussard served as a Production Engineer in Houston, TX, for Newfield Exploration Company. He is a 2011 graduate of Louisiana State University with a BS in Petroleum Engineering.

RUSSELL BUEHRLE with GeoSouthern Energy Corp.

WILLIAM D. "DREW" BURNHAM primarily represents and advises oil and gas companies in federal and state litigation. He has handled claims concerning lease rights, unleased mineral owner rights, mineral servitudes royalty and overriding royalty disputes, production in paying quantities, well control (blowout), subsurface trespass, unitization/pooling, the Risk Fee Act, the Louisiana Oil Well Lien Act, title disputes, water rights, environmental contamination, and local regulations of oil and gas development. Drew's practice includes the drafting and analysis of mineral leases, pipeline right-of-way/servitude agreements, water use agreements, and related contracts. For the past several years, he has presented at the Ark-La-Tex Association of Professional Landmen's annual seminar on recent developments in Louisiana mineral law. He has authored articles for Biz Magazine and the Institute for Energy Law's Oil & Gas Report. In 2016, he co-authored a paper for the Louisiana Mineral Law Institute with former Commissioner of Conservation Philip N. Asprodites. Mr. Burnham's practice also includes the representation of clients in eminent domain claims involving natural gas pipeline and other utility companies, and general commercial litigation, often involving issues of contractual interpretation, mismanagement of corporate or company resources, unfair trade practices, fraud, bad faith, and indemnity disputes. Additionally, he has experience in the auction, sale and donation of art, historical artifacts, and items regulated under the Endangered Species Act. Mr. Burnham received his

undergraduate degree, magna cum laude, from Centenary College of Louisiana, in Shreveport, Louisiana, where he was president of the Student Government Association and recipient of the Ellis H. Brown Leadership Award. He received his law degree from Louisiana State University in Baton Rouge, Louisiana, where he was a published member of the Louisiana Law Review, recipient of several CALI Awards for Excellence, and elected Order of the Coif. He served as law clerk to the Honorable Elizabeth E. Foote, United States District Court for the Western District of Louisiana. He is an active member and deacon at Broadmoor Baptist Church. He has served on the Board of Directors of Catholic Charities of North Louisiana since 2016 and is currently serving as Secretary. He is presently the coordinator of the mentorship program for the Harry V. Booth Judge Henry A. Politz American Inn of Court. Drew was admitted to practice in Louisiana in 2015 and in Texas in 2016. He joined the firm in 2016. His e-mail address is drew.burnham@cookyancey.com.

FRANK N. CUSIMANO, III previously served as a Senior Counsel for Chevron U.S.A. Inc., based in Houston, Texas. His in-house practice included mostly oil and gas transactions for Chevron, particularly for its Permian Basin assets. He also has experience with Chevron's deepwater Gulf of Mexico operations. Frank is a 1985 graduate of Tulane Law School in New Orleans, LA. Following two years of private practice in Baton Rouge, Frank joined Chevron's Land Department in New Orleans in 1987. In 1992, Frank transferred to Midland, TX and into Chevron's Law Department. He has been in Houston since 2004.

SARAH Y. DICHARRRY is a partner in Jones Walker's Litigation Practice Group. She focuses her practice on counseling exploration and production companies on compliance with federal statutes and regulations, and representing companies in administrative and judicial appeal proceedings and in response to government-initiated enforcement actions.

JAMES "JIMMY" H. DUPUIS JR. is the founder of Dupuis Law Firm, PLLC. He has more than 20 years of experience representing energy companies, and is licensed to practice law in Colorado, Louisiana, New Mexico, Oklahoma, and Texas. His oil and gas work includes advising and assisting operators and non-operators in all phases of exploration and production, including land and title issues, and operational and regulatory issues. He has extensive experience preparing title opinions, negotiating and drafting contracts, and performing due diligence in connection with the acquisition and divestiture of oil and gas assets. His renewable energy work includes negotiating and drafting solar leases, and advising on surface and oil gas issues. He performs due diligence, negotiates and drafts contracts, resolves issues presented by severed estates, and works to cure title and survey issues.

DONNA Y. FRAZIER was appointed Caddo Parish Attorney in July 2013. Prior to her appointment, she served as Assistant Parish Attorney for eight years. Her responsibilities include advising the Caddo Parish Commission and parish personnel on legal matters, and supervising litigation wherein the Parish is a party. Ms. Frazier holds a J.D. from the University of Texas and a B.A. in Political Science from Louisiana State University. She is licensed to practice law in Louisiana. Prior to starting with the Caddo Parish

Attorney's Office, Ms. Frazier was a Caddo Parish Assistant District Attorney. She spent eight years as a prosecutor working her way from general misdemeanor assistant to Section Chief of the Drug Section. A Past Chair of the ABA Section of State and Local Government Law (2015-2016), Ms. Frazier also holds the following memberships/positions: President of the Shreveport Bar Association, Fellow of the American Bar Foundation, Louisiana Parish Attorney's Association (a former President), Harry V. Booth and Judge Henry A. Politz American Inn of Court (Master of the Bench).

SARA MOULEDOUX GLOVER advises energy companies on transactional matters, including acquisitions and divestitures, and financing and commercial transactions primarily in the upstream and midstream segments of the industry. She has a particular focus in areas relating to the energy transition, including environmental, social and governance (ESG) trends in the oil and gas industry. Ms. Glover also handles matters involving surface rights, joint operating agreements, title, master services agreements, indemnity obligations, legacy environmental contamination, preferential rights and well control responses.

TYLER P. GRAY, Secretary Director, Corporate and Government Affairs Placid Refining Company, LLC. Tyler Gray currently serves as the corporate secretary for the Placid Refining Company, LLC; an independent and privately owned, oil and gas company, producing and distributing a full range of transportation fuels across the Southeast from Texas to Maryland. Previously, he served as president and general counsel to Louisiana Mid-Continent's Oil and Gas Association, advocating for members on all oil and gas issues as the youngest president in the Association's 98-year history. Prior to that, Tyler served as an attorney in the Department of Natural Resources, Office of Conservation and for the City of New Orleans. He graduated with a B.A. in Economics from James Madison University in Virginia, received his J.D. from Loyola University in New Orleans, M.B.A. with a specialization in Economics from Louisiana State University, and is licensed to practice law in Louisiana. His most important (and ongoing) accomplishment are his three children, Hutson (6), Ella (5), and Townes (1), that he and his wonderful wife, Sarah, are trying to steer in the right direction. Lastly, he serves on the boards of the Louisiana Arts and Sciences Museum, St. James Episcopal Day School, the Louisiana Association of Business and Industry, and several state boards.

ROBERT "ROB" G. HARGROVE represents oil and gas producers and occasionally landowners in oil and gas disputes, both in courthouse litigation and in contested cases before the Railroad Commission of Texas. In addition to Texas state courts, Rob is licensed in the Federal District Courts for the Western, Northern, and Southern Districts of Texas, as well as the 5th Circuit Court of Appeals. He has handled oil and gas litigation matters around the State and has presented oral argument in a number of Texas intermediate Courts of Appeals. Rob is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization, and he is on the Council of the Oil, Gas & Energy Resources Law Section of the State Bar of Texas (term expires in 2023). He is frequently asked to be a speaker at Texas oil and gas CLE presentations. Rob is a Life Fellow of the Texas Bar Foundation and was on the Council of the Administrative and Public Law Section of the State Bar of Texas from 2017 through 2021. He was the chair of the Oil and Gas Section of the Austin Bar Association in the 2012-2013 bar year. Rob grew up in

Shreveport, Louisiana, and graduated from Princeton University with an A.B. in English in 1997. He received his J.D. from the University of Texas School of Law in 2001. He's practiced law in Austin his whole career. Rob is married to a lawyer, and they have three children, a dog, a bird, and a guinea pig.

AIMEE W. HEBERT helps clients in the energy business solve their challenging legal problems. Her experience includes disputes that involve mineral royalties, mineral lease termination, implied obligations, mineral servitude maintenance, operating agreements, production handling agreements, blowouts, and oilfield environmental issues. She represents both individuals and businesses and gets excellent results. U.S. News and World Reports has included Ms. Hebert on The Best Lawyers in America[®] ranking every year since 2016. Since 2015, Ms. Hebert was named a Louisiana Super Lawyer by Thomson Reuters. Ms. Hebert was also voted by her peers as among the city's best attorneys in polls conducted by New Orleans Magazine, and New Orleans CityBusiness. Ms. Hebert's involvement in energy law extends beyond the courtroom. She is a member of the Advisory Council of Louisiana Mineral Law Institute and has been appointed to serve on the Louisiana Law Institute's newly formed Mineral Law Committee, which studies and develops new legislation. She teaches basic oil and gas law at Tulane Law School as an adjunct Assistant Professor in Law. She is also a frequent speaker for industry groups, including the Rocky Mountain Mineral Law Foundation, CAIL's Institute for Energy Law, the Louisiana Mineral Law Institute, and the Women's Energy Network. Her goal is to stay on the forefront of developments in energy law to help her clients achieve their goals. Having clerked for the Honorable W. Eugene Davis, United States Court of Appeals for the Fifth Circuit, Ms. Hebert also handles appeals for clients in other industries. As appellate counsel, she handles cases that have been tried by Kelly Hart but also provides a fresh review for cases tried by other law firms.

JANE A. JACKSON is a partner at Kelly Hart Pitre in New Orleans. Ms. Jackson focuses her practice on energy, environmental, and oil and gas litigation. She represents clients in both state and federal court in a range of matters, including land damage lawsuits brought by landowners, land use and takings cases, regulatory compliance, and contract disputes.

COLLEEN C. JARROTT represents businesses across a diverse cross-section of industries, including energy, transportation, and hospitality. Ms. Jarrott provides guidance to companies throughout Louisiana on a variety of commercial disputes, contractual issues, and regulatory matters. She also provides guidance in the emerging area of carbon capture, utilization, and sequestration (CCUS). Ms. Jarrott is a litigator who has more than 15 years of experience assisting clients in a variety of industries including energy, transportation, and other commercial businesses. Ms. Jarrott focuses her practice on helping businesses resolve disputes with particular experience in complex commercial litigation, transactional and regulatory matters. A large portion of Ms. Jarrott's practice focuses on commercial contracts, including review and input on provisions that protect her clients' businesses and operational concerns, as well as defending businesses should a dispute arise. In addition, Ms. Jarrott provides advice related to CCUS. She advises her clients on statutory and regulatory requirements surrounding CCUS in Louisiana as well as expropriation issues relating to lands, wells and deep geological formations. Ms. Jarrott also provides guidance on the developing legislative initiatives related to the Louisiana Geologic Sequestration of Carbon Dioxide Act (La. R.S. 30:1101 et seq.) and actively participates on the Louisiana Department of Natural Resources' Ad Hoc Committee on Carbon Capture as well as the Louisiana Mid-Continent Oil & Gas Association's (LMOGA) Carbon Committee. Ms. Jarrott served as law clerk to the Honorable Robert H. Hodges, Jr., United States Court of Federal Claims.

JERRY LANG joined Louisiana Department of Environmental Quality (LDEQ) in 2012. He currently serves as DEQ's Emergency response section manager. He is a graduate of Louisiana State University with a BS in Biological Sciences. When he is not busy responding to environmental incidents, you can find him fishing the barrier islands of the State of Louisiana.

CHRISTOPHER J. LENTO is an LSU Law graduate and has been licensed as an attorney in Louisiana, Texas and New Mexico. At LSU Law, Mr. Lento served as the Editor of the MLI newsletter, was a founding member of the LSU Energy and Mineral Law Society, and created the LSU Energy and Mineral Law Writing Competition, which at the time was a joint collaboration between the MLI, the LSU Energy and Mineral Law Society and the LSU Journal of Energy Law and Resources. He has worked as a landman in numerous states, and has worked at the Louisiana Department of Justice handling Oil and Gas bankruptcies and mineral title disputes since 2015.

SETH A. LEVINE is a partner in Jones Walker's Corporate Practice Group. Seth has a wide-ranging practice primarily focused on the energy and renewables industries and has extensive experience in project infrastructure financing, land acquisitions, servitude acquisitions, mineral issues, title and surveys, and all other real estate matters, including all aspects of commercial and industrial real estate development, diligence, industrial and commercial leasing, and land use matters.

JUSTIN J. MAROCCO is partner in Jones Walker's Litigation Practice Group. Justin has a wide-ranging practice, primarily focused on handling a broad array of complex commercial litigation in the energy, maritime, construction, and environmental sectors. Justin focuses on advising clients on legal and regulatory issues in connection with CO2 sequestration, storage, and enhanced recovery projects, as well as other large energy infrastructure projects.

DAVID K. MCCRORY is a partner with the Ottinger Hebert Law Firm. He focuses his practice on resolving commercial disputes, including energy and environmental defense. Mr. McCrory graduated Order of the Coif from the Paul M. Hebert Law Center in 2006 and currently is a member of the Louisiana Mineral Law Institute Advisory Council.

PATRICK S. OTTINGER is a Partner in the Lafayette law firm of Ottinger Hebert, L.L.C. He has been in private practice in Lafayette since December 1973, with his practice being concentrated in the area of oil and gas. He received his Juris Doctorate degree in December 1973 from Louisiana State University Paul

M. Hebert Law Center. Mr. Ottinger is an Adjunct Professor of Law at LSU, teaching the course on Mineral Rights from 1996-2012, and currently teaches an Oil & Gas Seminar. He is the author of the course materials entitled Ottinger, A Course Book on Louisiana Mineral Rights (12th Rev. Ed., August 2011), and Louisiana Mineral Leases: A Treatise (Claitor's 2016). He has published numerous articles in the Louisiana Law Review, Louisiana Mineral Law Institute, and the LSU Journal of Energy Law and Resources. He is the Immediate Past Chair of the Advisory Council for the Institute on Mineral Law at LSU Law Center. He serves on the Advisory Board for the John P. Laborde Energy Law Center at the Paul M. Hebert Law Center at Louisiana State University. Mr. Ottinger serves as the Reporter of the Mineral Law Committee and of the Louisiana Risk Fee Act Committee of the Louisiana State Law Institute, and served as the Vice-Chair of the Risk Charge Commission established by the Louisiana Legislature. Mr. Ottinger served as the President of the Louisiana State Bar Association during the years 1998-99. On June 7, 2018, he received the 2018 Curtis R. Boisfontaine Trial Advocacy Award of the Louisiana Bar Foundation, awarded for "long-standing devotion to and excellence in trial practice," and "upholding the standards of ethics and consideration for the courts, litigants and all counsel."

SCOTT R. PATTON is a Managing Member of Patton Law Firm, LLC, and focuses his practice in the areas of oil, gas, and energy law. His experience includes oil & gas title examination; unitization; carbon capture, utilization, and storage (CCUS); regulatory consultation; transactions; intrastate pipeline regulation; and litigation. Mr. Patton frequently represents operators before the State Mineral and Energy Board on State lease issues and the Office of Conservation on various regulatory matters. Mr. Patton has represented various energy companies in the creation of drilling and production units across the State of Louisiana, including the establishment of reservoir wide units and secondary recovery projects, along with obtaining approval of alternate unit wells and cross unit alternate unit wells. Mr. Patton has drafted drilling and division order title opinions for oil and gas companies and mineral owners on acreage across the State Louisiana and frequently prepares unitwide division orders for operator clients. Mr. Patton also advises companies seeking to establish carbon capture, utilization, and storage (CCUS) projects in the State of Louisiana, including representation before the Office of Conservation, State Mineral and Energy Board, and Department of Wildlife and Fisheries. In 2007 and 2008, Mr. Patton served as Executive Counsel for the Office of Mineral Resources at the Louisiana Department of Natural Resources, where he provided legal counsel to the Office of Mineral Resources and the Louisiana State Mineral and Energy Board. Mr. Patton is admitted to practice in the State of Louisiana and the State of Texas. Mr. Patton received his undergraduate degree from Washington & Lee University in 2002 and his Juris Doctor and Bachelor of Civil Law Degrees from Louisiana State University in 2006.

H. MINOR PIPES, III is a founding member of the firm of Pipes Miles Beckman, L.L.C. He provides counsel in insurance coverage and bad faith litigation, construction law, general litigation, corporate litigation, and class actions. Minor has always been very involved with the Louisiana State Bar Association and with the Louisiana Bar Foundation. He is the current President of the LSBA, a Past President of the Louisiana Bar Foundation, Past Treasurer of the Louisiana State Bar Association, and a past member of numerous Louisiana State Bar Association's Nominating Committees. Minor was selected as a member of the inaugural class of Leadership LSBA, working with leadership of the Louisiana State Bar Association on

numerous projects to improve the legal profession. Minor also serves as Co-Chair of the Louisiana State Bar Association Summer School Committee. Since being admitted to the Bar, Minor has tried numerous cases to decision, in both state and federal courts. Minor was the lead negotiator for the defendants in the Global Settlement of a national class action involving eight hundred settling defendants – the matter of In re: Chinese Manufactured Drywall Products Liability Litigation (E.D. La. MDL No. 2047). Minor has been recognized among the top 50 lawyers in the State of Louisiana by Louisiana Super Lawyers. He also has been recognized as a top lawyer by New Orleans Magazine, a leading lawyer in the city by Best Lawyers and New Orleans CityBusiness, and a "Litigation Star" by Benchmark Litigation. Minor is a Fellow of the International Society of Barristers. His community involvement includes working with Trinity Episcopal School and numerous non-profits in the area, including Hogs for the Cause as a Board Member of Fleur de Que.

THOMAS "TC" TURNER JR. is a Title Attorney with Stronghold Resource Partners. His practice includes all facets of oil and gas law in Texas, Louisiana and New Mexico. His current role focuses on mineral acquisitions in the Permian Basin and the Haynesville.

PETER "PETE" A. VERMILLION started out as a petroleum geologist working for Marathon Oil Corporation and a small independent before attending SMU law school and graduating in 1997. He was a partner at Thompson Knight and Kelly Hart and Hallman law firms where he focused on oil and gas litigation. In 2010, Mr. Vermillion went in-house with Chesapeake Energy. Over the past 10 years he has helped manage litigation for the company in the Barnett, Haynesville, Fayetteville, and Eagle Ford Shale plays. From 2016 to 2019 Mr. Vermillion was part of a small legal team primarily handling royalty litigation. In 2019 he moved into the role of Managing Attorney for the South Texas Business Unit where he manages litigation and provides legal support, including assisting with production sharing, water use, and subsurface easement agreements and coordinating with joint working interest parties.



Recent Developments

THE 69TH MINERAL LAW INSTITUTE MARCH 31 – APRIL 1, 2022 BATON ROUGE, LOUISIANA



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2022 RECENT DEVELOPMENTS

Subsurface trespass

Diamond McCattle Co., L.L.C. v. Range Louisiana Operating, LLC, No. 53,896 (La. App. 2d Cir. 4/14/2021), 316 So. 3d 603, *writ denied,* 324 So. 3d 92 (La. 9/27/21).

The plaintiffs sued Range Louisiana Operating, LLC ("Range"), claiming that it committed a subsurface trespass by drilling a horizontal cross-unit well into the subsurface of the plaintiffs' land, which was unleased. The parties filed cross-motions for summary judgment.

The undisputed facts showed that Range obtained a permit from the Office of Conservation to drill a lease-basis well to the non-unitized L-Gray Sand formation although the actual permitted vertical depth was within the previously-unitized and shallower Lower Cotton Valley Formation, Reservoir A (the "LCV RA"). Range commenced drilling the well from a tract under lease to Range and drilled to the LCV RA. After reaching that total vertical depth, Range drilled horizontally for nearly 5,000 feet, the last 1,443 of which was beneath the plaintiffs' land in the adjoining section, which also had been previously unitized for the LCV RA. The well was completed on January 10, 2018, and the plaintiff filed this lawsuit two days later. On February 28, 2018, Range applied to the Office of Conservation to amend its permit to designate the well as a cross-unit well for the two preexisting LCV RA units. The permit was so amended, with an effective date of March 27, 2018.

In their motion for summary judgment, the plaintiffs alleged that the drilling of the well beneath their land constituted a subsurface trespass because the well was permitted a lease-basis well and the permit was not amended until several months after the well had been completed. As a result, the plaintiffs claimed the ownership of that portion of the wellbore beneath their tract, as well as 100% of the well's production (or the equivalent value thereof). In its motion for summary judgment, Range argued that, under *Nunez v. Wainoco Oil & Gas, Inc.,* 488 So. 2d 955 (La. 1986), the original permit does not determine whether a well is a lease-basis or unit well. Rather, intent of the operator and the actual operations conducted control. Here, because Range had always intended to drill a LCV RA well and, in fact, did so, the well should be deemed a unit well for the two pre-existing LCV RA units.

In support of its motion, Range submitted the uncontested affidavits of several experts. Philip Asprodites ("Asprodites"), a former Commission of Conservation, explained that it is an accepted practice for the Office of Conservation to issue a permit that authorizes an operator to drill to a deep, non-unitized formation, even though the operator's objective is to test a shallower, unitized formation. Bob Anderson, the former manager of the Office of Conservation's Shreveport district office, further explained that it is common practice to designate a well as a lease well so that an operator can obtain a permit and begin drilling without having to wait for the hearing that is required to have a well designated as a crossunit well. Subsequently, a hearing is held, at which the well's permit is amended to

(1)

properly show it as a cross-unit well.

The trial court granted Range's motion for summary judgment, and the plaintiffs appealed to the Louisiana Second Circuit Court of Appeal, which affirmed. The appellate court reasoned:

[Range's] supporting affidavits are sufficient to resolve all issues of material fact. Plaintiffs did not counter these affidavits with their own evidence of Range's intent or that these were not the procedures of the Office of Conservation. After our *de novo* review of this record, we find that there are no genuine issues of material fact which render summary judgment in favor of [Range] improper at this time. Because the facts show the Well to be a unit well, we also find that the Plaintiffs have not shown that Range committed a subsurface trespass, and therefore, their partial motion for summary judgment was properly denied.

This case is particularly important because it applies the basic holding in *Nunez—viz.*, that unitization precludes a claim for subsurface trespass by an unleased owner within a compulsory drilling and production unit—to cross-unit wells. This is in line with the Louisiana Supreme Court's statement (from footnote 28 in *Nunez*) that it is the "intent of the operator and the operations conducted which determine whether drilling operations constitute unit operations or merely lease operations," not the substance of the well's original permit.

Pipelines

(2) Mary v. QEP Energy Co., --- F.3d --- (5th Cir. 2022), 2022 WL 154483.

The plaintiffs granted a pipeline servitude to QEP Energy Company ("QEP"), which permitted QEP to install a pipeline within a certain defined right of way on their property. QEP built the pipeline, but inadvertently constructed portions outside of the defined area. After the pipeline had been in use for some time, the plaintiffs discovered the trespass and sued QEP for damages, including the disgorgement of any profits that QEP had earned from the use of the pipeline.

The United States Fifth Circuit Court of Appeal considered three potential bases for the plaintiffs' disgorgement theory: accession, breach of contract, and trespass. Under the law of accession, the ownership of a thing includes the ownership of everything it produces, including all "fruits" and "products." Because QEP had no right to build the pipeline outside of the right of way, the plaintiffs contended that QEP was obligated to disgorge the profits (or fruits) that QEP had made as a result of the trespassing pipeline. The court rejected this contention, reasoning:

Disgorgement in this circumstance is limited to the additional profits

QEP earned, if any, as a direct result of installing the [pipeline] partly outside the servitude boundary, as compared to the profits QEP would have earned if it had installed the pipeline entirely within the servitude. . . . Here, . . . , most of QEP's activity on the [plaintiffs'] land is authorized-the [pipeline] deviated from the servitude for a total of approximately 46 feet, while approximately 8,000 feet of pipeline . . . over the [plaintiffs'] land were within the servitudes. It does not follow, then, that QEP must disgorge all of its profits from this gas, because not all of QEP's activity was unauthorized. It is only the additional profits QEP earned as a result of its encroachment that could be properly considered "the ill-gotten gains of [the defendant's] unlawful act, done to the manifest prejudice of plaintiff's right." . . . The [plaintiffs] admitted at oral argument that they have no evidence that QEP earned any additional profit on account of the minor deviation of the [pipeline] beyond the servitude boundary. Therefore, the [plaintiffs] re not entitled to disgorgement under an accession theory.

As for breach of contract, the court explained that disgorgement is not a remedy available for breach of contract. Rather, Civil Code Article 1995 states that damages for breach of contract "are measured by the loss sustained by the obligee [*i.e.*, the plaintiffs] and the profit of which he has been deprived." Again, there was no evidence that the *plaintiffs* had sustained a loss or been deprived of any profits as a result of the encroaching pipeline. In effect, this is the difference between compensatory damages (meant to remedy a loss) and exemplary damages (meant to punish).

Finally, addressing the trespass claim, the court explained that, even if disgorgement is an available remedy, there was, again, no evidence that QEP earned a profit from the trespass above and beyond what it would have earned had the pipeline been fully within the confines of the right of way. Reiterating what is in effect a new rule for disgorgement under these circumstances—*i.e.*, the encroaching but otherwise permitted pipeline—the court concluded:

In no event did the encroachment render QEP liable to the [plaintiffs] for all of the profits it earned from the gas that travelled through the pipelines. The most QEP would have to disgorge are the additional profits it earned as a direct result of the encroachment as compared to the profits it would have earned if the pipelines had been installed entirely within the servitude boundary. Because the [plaintiffs] have no evidence that QEP earned any such additional profits, the district court correctly determined that QEP was not responsible for disgorging its profits

(3) Bayou Bridge Pipeline, LLC v. 38.0 Acres, More or Less, No. 20-1017 (La. 5/13/21), 320 So. 3d 1054.

This matter concerns Bayou Bridge Pipeline, LLC's construction of a 162.5-mile crude oil

pipeline from Lake Charles to St. James, Louisiana. After obtaining several federal and state environmental permits, Bayou Bridge began to acquire the servitudes necessary to build the pipeline. One of the parcels was a 38-acre tract (the "Property"), which was owned by 470-plus heirs. Bayou Bridge acquired servitudes from some, but not all of, the heirs and began construction activities on the Property.

On July 27, 2018, Peter Aaslestad ("Aaslestad"), one of the heirs, brought suit to enjoin Bayou Bridge. Although construction was already 90% complete, Bayou Bridge agreed to cease its activities on the Property and immediately commenced an expropriation action against the 393 heirs who had not granted Bayou Bridge servitudes, including Aaslestad and dozens of absentees. The defendants answered, challenging the constitutionality of Louisiana's expropriation laws as it applied to private entities, like Bayou Bridge, and asserted a reconventional demand, seeking damages for trespass and violation of their due process rights.

The district court sustained the legality of the state's eminent domain scheme under both the Louisiana and federal constitutions, found that the expropriation of the pipeline servitude was both necessary and for a public purpose, and entered judgment in favor of Bayou Bridge, setting just compensation at \$75 per defendant. The trial count went on to find that Bayou Bridge's activities on the property prior to expropriation constituted trespass and awarded each defendant an additional \$75.

Three of the defendants appealed to the Louisiana Third Circuit Court of Appeal. On the constitutionality issue, the court found that Louisiana's expropriation laws did not run afoul of the 5th or 14th Amendments to the U.S. Constitution because they included sufficient standards to guide expropriating authorities and the courts and provided for judicial review. On the taking, the court rejected the defendants' argument that the environmental impact of the pipeline had not been properly considered. Finally, on the trespass claim, the court observed that Bayou Bridge had admitted to trespassing on the Property prior to expropriation in contravention of both the defendants' property rights and the explicit provisions of La. R.S. 19:8(A)(3). Because Bayou Bridge willfully, wantonly, and recklessly violated the defendants' property rights, the court increased the damages award to \$10,000 for each defendant, admonishing:

[Bayou Bridge] conduct clearly shows no fear of the consequences of trampling on property owner's constitutionally protected due process rights. Accordingly, any such damage award for these Defendants should be one which communicates to [Bayou Bridge] that it did not "have the unrestrained ability to decide whether another citizen's property rights can be restricted" without due process of law

The appellate court also awarded attorney fees to the defendants, relying on La. R.S. 13:5111, which is entitled "Appropriation of property by state, parish, municipality or agencies thereof."

The Louisiana Supreme Court granted writs on the attorney fee issue. Bayou Bridge contended that La. R.S. 13:5111 does not authorize an attorney fees award against a private company. The court agreed, but awarded the defendants attorney's fee under Article I, § IV of the Louisiana Constitution, which entitles an owner whose property is taken in an expropriation proceeding to receive compensation for "the full extent" of the his loss, which "shall include, but not be limited to, the appraised value of the property ... and all other damages actually incurred by the owner because of the expropriation." Justice Crain dissented in part. He agreed that Article I, § IV implicitly authorizes an award of attorney fees, but Bayou Bridge had offered each defendant \$75 before expropriation, and, since this is the amount each defendants was awarded for just compensation, the defendants' attorney's fees were not incurred "because of the expropriation."

(4) *Morgan City Land and Fur Co., L.L.C. v. Tennessee Gas Pipeline Co., L.L.C.,* Nos. 20-676 and 20-575 (La. App. 4th Cir. 4/21/21), 319 So. 3d 437, *affirmed in part and reversed in part,* No. 21-704 (La. 10/12/21), 325 So. 3d 1051.

Landowner's predecessors-in-interest granted pipeline servitudes during the 1950s and 1960s which allowed the grantees (four pipeline companies) to construct navigable canals needed to construct, operate, and maintain the pipelines. The pipeline servitude agreements imposed certain express duties relating to the construction and maintenance of bulkheads and plugs on the canals.

In 2018, the landowner filed suit against the pipeline companies' successors, alleging that the canals' banks had eroded and the canals had, therefore, widened due to improper maintenance. The parties filed cross-motions for summary judgment, seeking a declaration as to the extent of the pipeline companies' duty to maintain the canals. The district court held that, under the servitude agreement, the pipeline companies had a duty to maintain the bulkheads and plugs, but did not have a duty to maintain the width of the canals. The landowner appealed.

The Louisiana Fourth Circuit Court of Appeal reversed and remanded, holding that the pipeline companies have an implied duty to maintain the width of the canals. The appellate court reasoned that the pipeline companies have a duty to "not to aggravate the servient estate," but held that what constituted an "aggravation" is a fact question which could only be resolved by a trial on the merits. The pipeline companies applied to the Louisiana Supreme Court for a writ of review, which was granted in part and accompanied by a *per curium* opinion stating:

Having correctly found factual questions precluded summary judgment, the court of appeal erred in passing on the existence of a duty, an issue which is closely intertwined with the facts. Accordingly, the judgment of the court of appeal is affirmed insofar as it reverses the district court's grant of partial summary judgment, but the portion of the opinion discussing the existence of an implied duty is vacated and set aside. In all other respects, the writ is denied. The case is remanded to the district court for further proceedings.

Mineral lease—royalty

(5) *Magee v. BPX Properties, (N.A.), L.P.*, 830 F. App'x 740 (5th Cir. 2020).

The Magees granted multiple mineral leases to the predecessor of BHP Billiton. BHP suspended royalties potentially due and payable under the leases because a dispute existed as to whether the Magees' land was burdened with a mineral servitude in favor of a third person. In suspending the royalties, BHP relied upon language in the leases providing that, in the event of a title dispute, no royalties were due and payable to the lessor until thirty days after the lessor provided the lessee "with a certified copy of the instrument or instruments disposing of such suit, claim or dispute, or [] being furnished with proof sufficient, in Lessee's opinion, to settle such question."

The Magees filed suit in state court and obtained a judgment recognizing that the servitude in question had prescribed. After the judgment was affirmed by the Louisiana Second Circuit Court of Appeal, the Magees sent a copy of the final judgment to BHP. However, BHP did not commence paying royalties, and the Magees brought suit against BHP in federal court for royalty underpayments, penalties and attorney fees under La. R.S. 31:137 *et seq.* BHP filed a motion for summary judgment, which the federal district court granted, reasoning that the Magees failed to provide BHP with a certified copy of the judgment as expressly required by the lease. The court explained that, when the Magees eventually sent a certified copy, BHP made timely payment of the suspended royalties, which precludes a claim under Article 137.

The Magees appealed to the United States Court of Appeal for the Fifth Circuit, arguing that, even though they had not provided BHP with a certified copy of the judgment, the lessee had, under the lease, an independent duty to exercise good faith in determining whether it possessed sufficient proof to deem the title dispute resolved. The appellate court rejected this argument, reasoning that, even if the lessee was bound by such a duty, there was no evidence of bad faith on the part of BHP.

Mineral lease—top lease

(6) Amber, LLC v. Welsh Oil Co., Inc., No. 53,871 (La. App. 2d Cir. 4/14/21), 319 So. 3d 427.

This case concerns claims of conflicting leases. Amber, LLC ("Amber"), claimed the ownership of a leasehold interest in 40 acres in Webster Parish under two mineral leases. The first lease was granted in 1974 (the "1974 Lease"), had a three-year primary term, and initially covered all depths. The parties later amended the 1974 Lease so that it only covered depths shallower than 10,000 feet. After the 1974 Leases was amended, in 1975, a second lease was granted (the "1975 Lease"), which a five-year primary term and purported to cover all depths. Welsh Oil Co., Inc. ("Welsh"), asserted that a leasehold interest in the same property under a 2005 mineral lease (the "2005 Lease"), which had a two-year primary term and purported to apply to depths below 6,000 feet. Welsh farmed

out its rights in the 2005 Lease to Marathon Oil Company ("Marathon"), which drilled a well to 11,000 feet within the lease's primary term (the Well").

In 2008, Amber filed suit, seeking a declaration as to which lease was in effect for which depths and sought compensation from Marathon for production from the Well. The Louisiana Second Circuit Court of Appeal rejected Amber's contention that the 1975 Lease somehow constituted a novation of the 1974 Lease and, therefore, controlled. Instead, the court held that the 1974 Lease covered depths shallower than 10,000 feet and had been maintained by production to the present. The 1975 Lease only affected depths below 10,000 feet and constituted a top lease as to depths above that line. As there was no production from the depths subject to the 1975 lease within its primary term, that lease terminated in 1980. Finally, the 2005 Lease was a top lease for depth from 6,000 to 10,000 feet (subject to the 1974 Lease), but otherwise was in effect for depths below 10,000. Accordingly, Amber was not entitled to compensation from Marathon for production from Well.

Mineral lease—restoration

(7) Upshaw v. SWN Production Co., LLC, No. 20-227 (W.D. La. 12/14/20), 2020 WL 7343143.

The plaintiffs granted an oil and gas lease to SWN Production Company, LLC ("SWN") with an effective date of July 12, 2012, and a three-year primary term (the "2012 Lease"). The 2012 Lease contained a restoration clause which provided that "Lessee . . . agrees that within six (6) months of completion of drilling a hole on said lands, and such hole, has been determined to have no production value, such hole shall be abandoned and plugged, according to state laws." In 2013, SWN constructed an eight-foot by eight-foot cellar on the property, drilled an 80-foot conductor hole and a 90-foot mouse hole, but did not conduct any further operations.

In April 2015, the plaintiffs demanded that SWN restore the property. Thereafter, the plaintiffs granted a new lease to SWN affecting the same property, with an effective date of July 17, 2015, and a three-year primary term (the "2015 Lease"). The 2015 Lease provided that, "[i]f Lessee transfers its interests hereunder, in whole or in part, Lessee shall be relieved of all obligations thereafter arising with respect to the transferred interest." On July 12, 2019, SWN assigned its interest in the 2015 Lease to Velandera Energy Partners, LLC ("VEP"), and the lease expired at the end of its primary term.

The plaintiffs sued SWN and VEP, contending that they breached their restoration obligations under the leases. SWN moved for summary judgment, contending (i) that, under the 2012 Lease, it did not owe a restoration obligation because, although it had drilled the conductor and mouse holes, there was no proof that they were incapable of producing oil and gas; (ii) that, in any event, the 2015 Lease had been a novation of the 2012 Lease, terminating any restoration obligation SWN might have had thereunder; and (3) that, under the terms of the 2015 Lease, SWN had been relieved of any restoration obligation upon the assignment of the lease to VEP.

The court summarily rejected SWN's first contention, finding that the restoration obligation only required that a hole be drilled. In this instance, it was axiomatic that the conductor and mouse holes were not capable of producing oil and gas. Additionally, there was no evidence that the parties intended the 2015 Leases to be a novation of the 2012 Lease. Rather the 2015 Lease was an entirely separate lease. Finally, the court held that the obligation to restore the leased premises had indubitably arisen prior to the termination of the 2012 Lease to relate to restoration, under its plain language, the restoration obligation had arisen prior to the assignment, and SWN was, therefore, not relieved therefrom.

(8) *Emerald Land Corp. v. Trimont Energy (BL) LLC*, No. 17-1655 (W.D. La. 8/4/21), 2021 WL 3416895.

Lessor granted Texaco three mineral leases affecting 6,000 acres of marshland. During the term of the leases, Texaco constructed underground pipelines (flowlines) on the property. After the leases terminated, the mineral lessor's successor brought suit against Chevron, as Texaco's successor in interest, seeking to force it to remove the pipelines.

Chevron took the position that, under *Terrebonne Parish School Bd. v. Castex Energy, Inc.*, No. 04-968 (La. 1/19/05), 893 So.2d 789, 801, it was not obligated to remove the flowlines. In that case, the Louisiana Supreme Court held that Mineral Code article 122, which concerns the prudent operator standard, does not "impose an implied duty to restore the surface to its original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively." In this instance, Chevron argued that the leases expressly granted Texaco the right to install pipelines on the premises and that, in the absence of a contractual obligation to the contrary, the law does not imply a duty to remove those lines.

The plaintiff attempted to distinguish *Castex* on the grounds that, in that case, the lessee had altered the natural terrain by digging canals and ditches, whereas in this case the lessee had buried "foreign equipment" on the premises. The court rejected this contention, explaining the Supreme Court's rationale in *Castex* as follows:

Under the Louisiana Civil Code, a lessee is bound to "return the thing at the end of the lease in a condition that is the same as it was when the thing was delivered to him, except for normal wear and tear." A lessee also has a duty to avoid unreasonable or excessive use of the property during the term of the lease. In *Castex*, however, the Louisiana Supreme Court held that "in the absence of an expressed lease provision, [the Mineral Code] does not impose or imply [a] duty to restore the surface to it's original, pre-lease condition absent proof that the lessee has exercised his rights under the lease unreasonably or excessively." According to the Court, a lessor in the context of an oil and gas lease "maybe considered to have a given his assent to the 'wear and tear' normally involved in

rights granted" in a mineral lease. There, the Court held that the plaintiff had no claim based on the canals that were dredged on the leased property because the right to dredge canals was explicitly granted in the lease and, therefore, was merely "wear and tear."

Here, the installation of flowlines below plough depth by the lessee were both inherent in the grant of the servitude and expressly consented to by the lessor. As such, under *Castex*, the flowlines constituted normal "wear and tear." Interestingly, the court suggested that surface pipelines might be treated differently in that "surface flowlines pose hazards and limit the use of the surface of the leased land in ways that flowlines buried at least three feet below the surface do not."

Finally, the lessor sought to recover from Chevron for the cost of removing the flowlines under the leases' damages clause which provided: "Lessee shall pay all damages caused by its operations hereunder to the land, buildings and improvements presently existing, and crops now or hereafter planted." The court held that the mere existence of the flowlines did not constitute "damages," reasoning:

[The plaintiff] contends that the flowlines on the leased property have damaged the land by creating navigation hazards, that leaks from flowlines are contaminating the property, and that flowlines protruding from the surface are limiting [the plaintiff] ability to enter into leases or otherwise use the land. Under *Castex*, [the plaintiff] does not have a private claim (whether as damages or specific performance) for the removal of buried flowlines. As with the dredged canals in *Castex*, [the plaintiff] (or its predecessor) consented to the installation of buried flowlines in the [leases] and (like the canals in *Castex*) the mere presence of these buried flowlines does not amount to "damages" in the sense of triggering the damages provision of the [leases] or a claim under the Mineral Code. On the other hand, even under *Castex*, [the plaintiff] could assert private claims under the leases and the Mineral Code with respect to buried flowlines if, for example, those flowlines leaked fluids that contaminated the leased property

In the absence of any reliable evidence of such damages, the court granted Chevron's motion for summary judgment and dismissed the plaintiffs' claims.

Louisiana Oilfield Anti-Indemnity Act

(9) Federal Insurance Co. v. Select Energy Services, LLC, No. 54,161 (La. App. 2d Cir. 1/12/22), 2022 WL 107984.

This case concerns the enforceability of a choice of law provision in a Master Service Agreement ("MSA") between Exco Operating Company ("Exco") and its contractor Select Energy Services, LLC ("Select"). When a rig collapsed in DeSoto Parish two workers, Paredes and Rodgerses, were injured. Rodgerses was an employee of another contractor of Exco, and Paredes was an employee of Select. The MSA contained the traditional "knock for knock" indemnity scheme where each party is obligated to indemnify the other for injuries to employees of the indemnitor and its contractors. Rodgerses filed suit in Louisiana, and Paredes filed suit in Texas.

In the Paredes suit, Exco demanded that Select defend and indemnify it. Select's insurer assumed the defense and settled the claim for \$31 million. In the Rodgerses suit, Select demanded Exco defend and indemnify it. Exco's insurer assumed the defense, subject to a reservation of rights. After the Paredes settlement was finalized, Exco withdrew its defense of Select and filed a suit seeking a declaration that its indemnity obligation under the MSA violated La. R.S. 9:2780, the Louisiana Oilfield Anti-Indemnity Act ("LOAIA"). Select went on to settle the Rodgerses suit. The district court granted summary judgment for Exco, and the Select appealed.

The Louisiana Second Circuit Court of Appeal reversed. The MSA contained a Texas choice of law provision. If LOAIA applied despite the choice of law provision, then the mutual indemnity provision for bodily injuries in the MSA would be invalid. However, if the Texas Oil Field Anti-Indemnity Act applied, then the mutual indemnity provision would be valid, but only "limited to the scope and amount of contractual indemnity insurance each party indemnitor has agreed to provide to the other indemnitee."

The court undertook a Louisiana choice of law analysis and observed Civil Code article 3450 states:

All... issues of conventional obligations [other than formal validity and capacity of the parties] and are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

The court noted that in *King v. I.E. Miller of Eunice, Inc.*, No. 07-167 (La. App. 3d Cir. 11/21/07), 970 So. 2d 703, *writ denied*, No. 07-2460 (La. 2/22/08), 976 So. 2d 1285, the court upheld a Texas choice of law provision in a Louisiana oilfield accident suit involving a Louisiana employee. Conversely, in *Silverman v. Mike Rogers Drilling Co., Inc.*, No. 45,119 (La. App. 2d Cir. 4/14/10), 34 So. 3d 1099, *writ denied*, 10-1128 (La. 9/17/10), 45 So. 3d 1049, the court held unenforceable an Arkansas choice of law provision in similar circumstances.

In enforcing the Texas choice of law provisions in the MSA, the appellate court found that Texas' interests outweighed Louisiana's interests, reasoning:

Because this dispute is between Texas companies which agreed to the application of Texas law and Select already performed its obligation pursuant to Texas law, Texas' policy of freedom of contract would be severely impaired if that contract is now invalidated pursuant to Louisiana law. That impairment to Texas policy is far greater than any impairment to Louisiana policy that could result from upholding Exco's indemnity obligation. Indeed, the policy underlying the LOAIA is to protect oilfield contractors from adhesionary indemnity obligations to oil companies. That policy is not impaired at all by upholding an oil company's indemnity obligation to its contractor—especially where the contractor has already satisfied its indemnity obligation to the oil company. Additionally, the injured workers have already been paid handsomely in settlement of their claims. Thus, Louisiana's policy of compensating injured oilfield workers would not be impaired by the application of Texas law in this case.

The case was remanded for evidence of the amount of insurance backing up Exco's indemnity obligation to Select.

Unitization

(10) *Hill v. Welsh*, No. 20-887 (La. App. 1st Cir. 4/16/21), 324 So. 3d 673, *writ denied*, No. 21-702 (La. 9/27/21), 324 So. 3d 93.

In 2007, the Office of Conservation granted TMR Exploration, Inc. ("TMR"), a permit to drill a horizontal well on property owned by A. Wilbert's Sons, L.L.C. ("A. Wilbert's Sons"), in West Baton Rouge Parish. TMR drilled and completed the Wilbert's Sons Well 93 No. 1 (the "Well") as a lease-basis well. In 2010, TMR transferred its interest in the Well to Park Exploration, Inc. ("Park"), which later transferred its interest to Vitol Resources, Inc ("Vitol"). At some point, Vitol discovered that the Wells' horizontal lateral extended into an adjacent tract owned by the Heirs of Peter Hill (the "Hills"). The Hills sued TMR, Park, and Vitol for subsurface trespass.

In 2014, during the pendency of the subsurface trespass suit and after the Well had been producing for some time, Vitol filed an application with the Office of Conservation to create a 320-acre drilling and production unit, encompassing the entirety of the A. Wilbert's Sons and Hill tracts, as well as an adjacent tract owned by Charles Salemi ("Salemi"). The Hills and Salemi proposed a counterplan under which their tracts would constitute a larger share of a smaller 167-acre unit.

After a hearing, the Commissioner issued an order, adopting Vitol's plan. Pursuant to La. R.S. 30:12, the Hills and Salemi appealed to the Nineteenth Judicial District Court. The district court vacated the Commissioner's order and remanded the matter back to the Commissioner for a rehearing. After a rehearing at which both sides presented expert testimony regarding the proper size of the unit, the Commissioner entered a new order, affirming his original 320-acre unit. The Hills and Salemi again appealed to the Nineteenth Judicial District Court. This time, the district court reversed the Commissioner and ordered him to adopt the 167-acre unit as proposed by the Hills and Salemi.

The Commissioner appealed, contending that the district court erred by substituting its

judgment for his own. The Louisiana First Circuit Court of Appeal reversed, holding that, under La. R.S. 30:12, the Nineteenth Judicial District Court acts as a type of appellate court, which reviews the Commissioner's factual findings for manifest error. The First Circuit went on to conclude that the factual findings in the Commissioner's unitization order did not constitute manifest error. The court explained that there had been competing expert testimony regarding the proper size of the unit and that Commissioner's decision to adopt testimony regarding the proper size of the unit and that Commissioner's decision to adopt one expert's opinion over another was within his discretion.

Oil Pollution Act

(11)United States v. KCM Management, Inc., No. 19-14580 (E.D. La. 8/10/20), 2020 WL 4584202.

KCM Management, Inc. ("KCM"), was the last operator of record of a well located in a navigable bayou in St. Charles Parish (the "Well"). LCVegas Corporation ("LCV") was a working interest owner in the Well. In 2014, the Office of Conservation sent a letter to KCM, stating that because the well had not been plugged in accordance with state law, it was deemed abandoned and orphaned. The letter also stated that KCM would be liable for any restoration costs.

Later that year, Conservation determined that the well was leaking oil and notified the United States Environmental Protection Agency ("EPA"). The EPA issued Notices of Potential Liability to both KCM and LCV. In their response to the notice, KCM and LCV admitted that KCM had been the last operator of record of the Well and that LCV had been the working interest owner therein.

EPA proceeded to plug and abandoned the Well, using funds from a trust fund which had been established by the Oil Pollution Act (the "Act"). Thereafter, the National Pollution Funds Center sent KCM and LCV an invoice for \$1,074,767.05 for the work. When KCM and LCV did not pay the invoice, the United States sued them in federal court. When KCM and LCV did not file answers, the government entered preliminary defaults against them and moved for a default judgment.

In confirming the default judgment against KCM and LCV, the federal district court noted that under the Act, a defendant is strictly liable and must reimburse the United States for the costs of removing oil pollution if the United States establishes each of the following requirements:

- (1)the defendant is a "responsible party";
- for the "facility" or "vessel"; (2)
- (3) from which oil was discharged, or from which there was a substantial threat of discharge;
- (4) "into or upon the navigable waters or adjoining shorelines"

and

(5) that the discharge resulted in "removal costs [or] damages."

The court determined that each of the foregoing elements was satisfied. The Act defines a "responsible party" as either a lessee or permittee. Since KCM held permits from the Conservation and LCV was a lessee, both qualified as responsible parties under the Act. The court went on to find (i) that a "well" fit the Act's definition of a "facility;" (ii) that the government's complaint had alleged that the well had leaked oil into the navigable waters of the United States; and (iii) that the government had incurred "removal costs."

There was no appeal from the district court's unreported opinion. This case is remarkable because, under the Oil Pollution Act (federal law), a non-operating working interest owner was held liable for the federal government's plugging and abandoning costs. Of course, under state law, only the last operator of record can be held liable for the state's cost to plug and abandoned well, with no recourse against non-operating working interest owners.

Well Cost Reporting Statute

(12) B.A. Kelly Land Co., LLC v. Aethon Energy Operating LLC, 25 F. 4th 369 (5th Cir. 2022)

The Well Cost Reporting Statute (La. R.S. 30:103.1-103.2) provides that an unleased owner is entitled to initial and quarterly reporting from a unit operator, and provides a significant forfeiture by the unit operator who does not timely send those reports. To get such reports, the unleased owner must first send a demand, via certified mail, to the operator for them. If the operator does not timely respond, then the unleased owner must send a second letter via certified mail, a notice calling attention to the operator's failure to comply with the requirements of La. R.S. 30:103.1. If the operator does not cure its default within 30 days of receipt, then, under La. R.S. 30:103.2, the operator forfeits its right to recoup the unleased owners *pro rata* share of the "costs of the drilling operations of the well."

In December of 2017, B.A. Kelly Land Co. sent Aethon a letter asserting that B.A. Kelly was an unleased owner within an Aethon-operated unit and requesting certain categories of information regarding the unit wells. Aethon did not respond to the request. In April of 2018, B.A. Kelly sent a second letter to Aethon asserting that Aethon had failed to comply with the earlier request and was in violation of Louisiana law. Within a matter of days and confused by the vague nature of B.A. Kelly's letter, an Aethon representative contacted B.A. Kelly and asked exactly what type of information B.A. Kelly was seeking. B.A. Kelly told the Aethon representative that it wanted a report like an earlier operator, Anadarko, had previously provided and offered to send the Aethon representative a copy of the Anadarko report. No report was forthcoming, and there was no further communication.

In September of 2018, B.A. Kelly filed suit, alleging that Aethon had failed to timely provide reporting under Section 103.1 and had forfeited its right to recoup the unleased owner's share of drilling costs for the unit wells under Section 103.2. B.A. Kelly filed a

motion for partial summary judgment on its forfeiture claim. Aethon opposed, contending that B.A. Kelly's letters were too vague to have triggered its reporting obligations and severe financial penalties provided for under the Well Cost Reporting Statute. The district court denied B.A. Kelly's motion and <u>sua sponte</u> granted summary judgment in favor of Aethon. The court explained that, as a penal statute, the Well Cost Reporting

in favor of Aethon. The court explained that, as a penal statute, the Well Cost Reporting Statute had to be strictly construed.

According to the court, B.A. Kelly's first letter was insufficient to trigger the reporting obligations under the Well Cost Reporting Statute because it neither cited to the statute, nor requested the "initial" and/or "quarterly" reports as provided for in La. R.S. 30:103.1. Similarly, the second letter was held to be deficient because it did not, clearly and unambiguously, in the words of Section 103.2, "call [Aethon's] attention to [the] failure to comply with the provisions of R.S. 30:103.1" or warn the operator of the consequences of failing to report as requested. The judgment was certified as final and appealed to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit reversed. The panel held that the district court had improperly created requirements for the letters not present in the Well Cost Reporting Statute. The Court stated that "a faithful reading of the statute demonstrates that its text primarily imposes a duty on operators to send reports when requested by unleased owners." Therefore, according to the Court, the unleased owner need not cite to Section 103.1 to invoke the reporting obligation or to invoke forfeiture under Section 103.2. Furthermore, the panel found that the language of the unleased owner's demand under Section 103.1 need not request reporting that mirrors that provided for by Section 103.1. Rather, the panel held that B.A. Kelly's Section 103.1 letter, by asking for reports with similar categories of information to that provided by the statute, was "a clear reference to the format required of reports under [Section 103.1]." "In sum, Kelly's letter was replete with references to the substance and terms of § 103.1 such that any operator in the position of Aethon would have been put on notice that the letter was a request for reports from a person or entity that claimed to be an unleased owner pursuant to that statute." The panel did not mention that Section 103.1 is a penal statute subject to strict construction, or that the letter requested information from Aethon that is not provided for by the Well Cost Reporting Statute. Finally, the Court held that the second letter had done enough, and that the district court had improperly added requirements to Section 103.2 by holding the letter to be deficient for not citing to the Well Cost Reporting Statute or referencing the possible penalty for non-compliance with the statute. What was enough in the panel's opinion was the second letter's notice of the operator that it had not provided reports in response to the prior letter.

(13)Limekiln Development, Inc. v. XTO Energy Inc., No. 20-145 (W.D. La. 2021), 2021 WL 956079.

Limekiln was an unleased owner within Section 15, Township 10 North, Range 10 West, Natchitoches Parish. XTO was the operator of the unit well for a drilling and production unit encompassing the section. On August 13, 2019, Limekiln sent an email to XTO, requesting well cost information for the well in question (the "Well"). The email identified Limekiln as the owner of "90 acres in the South Half of the Northwest Quarter of Section 15, Township 10 North, Range 10 West, Natchitoches Parish." The next day, XTO asked Limekiln to send its request by certified mail. Limekiln did so the same day. The request identified the Well, but did not provide the property description for Limekiln's tract. The next month, XTO sent Limekiln a summary statement of revenue and expenses for the Well. Limekiln asked XTO for more detail, which was not forthcoming.

Eventually. Limekiln sent a letter via certified mail to XTO, asserting that XTO had failed to comply with La. R. S. 30:103.1 by supplying "the necessary, sworn, detailed, and itemized statements" and notifying XTO of the penalties available under La R.S. 30:103.2. XTO responded with another summary report. At that point. Limekiln, filed suit against XTO for forfeiture of its share of drilling costs under La. R.S. 30:103.2, maintaining that XTO's well costs reporting did not meet the requirement of La. 30:103.1. XTO moved to dismiss, contending that Limekiln did not strictly comply with the requirements of the Well Cost Reporting Statute because the plaintiff's request for reporting under La. R.S. 30:103.1 did not include a property description. Additionally, XTO argued that that Limekiln's La. R.S. 30:103.2 notice was insufficient because it did not identify specific reasons why XTO's reports were deficient.

The federal district court denied XTO's motion to dismiss. The court noted that each of the statutory requirements had been satisfied by Limekiln's initial request and subsequent notice of default. The court reasoned that both letters identified the unit in question and Limekiln status as an unleased owner within that unit. There is no requirement in the Well Cost Reporting Statute that an unleased owner identify the property description. Moreover, XTO's own unit plat, which was attached to Limekiln's complaint, specifically showed Limekiln as the owner of the tract in question.

Unleased owners

(14) *Dow Construction, LLC v. BPX Operating Co.*, No. 20-9 (W.D. La. 9/30/21), 2021 WL 4492863.

Dow Construction, LLC ("Dow"), owned a mineral lease affecting acreage included within a Haynesville Shale drilling and production unit operated by BPX Operating Co. ("BPX"). Dow did not elect to take in kind, so BPX sold Dow's share of unit production and paid Dow the proceeds, netting out Dow's pro rata share of post-production expenses. Dow sued BPX alleging that, under La. R.S. 30:10(A)(3), BPX did not have the right to deduct post-production expenses from Dow's share of production.

La. R.S. 30:10(A)(3) states:

If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale

BPX filed a motion to dismiss, contending that Dow was not an "unleased owner" and that La. R.S. 30:10(A)(3), therefore, did not apply. BPX argued that La. R.S. 30:10(A)(3) only applies to interests which are not subject to a mineral lease. According to BPX, this would exclude Dow because Dow was a mineral lessee. However, Dow relied on *TDX Energy*, *LLC v. Chesapeake Operating*, *Inc.*, 857 F.3d 253, 262 (5th Cir. 2017), which held that an "unleased owner" within the meaning of La. R.S. 30:103.1 and 103.2 means an interest within the unit for which the operator does not own a lease.

The court noted that, at times, Title 30 uses "unleased interests" to mean completely unleased, and, at other times, the phrase means unleased only *vis-a-vis* to the operator of the well. The Court cited La. R.S. \S 30:10(A)(2)(e)(i) and La. R.S. 30:111 as examples where lessees are expressly excluded from the term "unleased interests." As for the risk charge provision, the court reasoned that, if the phrase "unleased interests" as used therein included lessees of leases not owned by the operator, then the "provisions about the risk charge would be superfluous because nobody would be subject to the risk charge provisions." In contrast, in *TDX*, the court held that the use of the phrase "owner or owners of unleased oil and gas interests" in the Well Cost Reporting Statute includes lessees of leases not owned by the operator or producer has no valid oil, gas, or mineral lease." Because the legislature uses "unleased interests" to mean different things, the court resolved to "examine the context."

The further court noted that La. R.S. 30:10(A) includes two references to "unleased owners." The first reference includes an additional clarifying phrase "not subject to an oil, gas, and mineral lease," whereas the second reference in Section 30:10(A)(3) does not. Moreover, the court reasoned that, when appended to "leased interest," the phrase "for which the party or parties entitled to market production therefrom" should be taken as clarification that mineral lessees are included in La. R.S. 30:10(A)(3). Had the legislature intended to limit this provision to a completely unleased interests, then the descriptive phrase would be superfluous because a landowner would always be the "party or parties entitled to market production." According to the court: "The only purpose this phrase serves is to include any party who has or has acquired the right to market production of an interest unleased by the operator," such as a lessee. Accordingly, the court denied BPX's motion.

Importantly, in a footnote, the court observed:

BPX's initial motion was limited to the application of section 10(A)(3). BPX did not brief whether post-production costs are incorporated into section 10(A)(3) or otherwise deductible through quasi-contractual principles. The Court is aware of *Johnson v*. *Chesapeake Louisiana, LP*, which is a case before another judge of

this court. No. 16-1543, 2019 WL 1301985 (W.D. La. Mar. 21, 2019). The court in *Johnson* determined that post-production costs were not chargeable to completely unleased interest owners because of section 10(A)(3). *Id.* at *5. There is a pending motion for reconsideration in the matter, which the court has not ruled on. Regardless of the outcome in *Johnson*, this Court is not bound by the decision of another district court and must reach its own conclusions. At this time, the Court takes no view on the issue.

Assignments

(15) *Goodrich Petroleum Co., LLC v. Columbine II, Limited Partnership*, No. 53,820 (La. App. 2d Cir. 4/14/21), 318 So. 3d 1062, *writ denied*, No. 21-680 (La. 9/27/21), 324 So. 3d 103.

In a concursus proceeding, defendants, Atlantic Richfield Company and BP America Production Company ("BP/ARCO") and Columbine II Limited Partnership ("Columbine") disputed whether an assignment applied (i) to all of BP/ARCO's royalty interests in the "Talbert" property or (ii) only to those royalty interests in unitized formations which were producing as of the effective date of the assignment. At issue were overriding royalty interests in the Haynesville Shale Formation, which, at the time of the assignment had not been unitized or produced.

In the assignment, BP/ARCO conveyed to Columbine "each overriding royalty interest, net profit interest or other non-cost bearing interest . . . which covers property as described in Exhibit A hereto." Exhibit A listed 1,500 properties and, with respect to the section at issue, stated:

Field Name	Property Name	Intr Type	Description of Lands
Bethany	Talbert S F Unit ORR	UI	All of Section 18-T14NR15W, containing 604.850 acres, as described more fully in Dept. of Conservation Order No. 289 dated 9-16- 54. ARCO interest reserved in Assignment dated 7-16-54 from Southern Production Co. to Ralph R. Gilster. et al. recorded in Vol. 725, Pg. 269 of the Conveyance Book.

The exhibit defined "Intr Type" as the "Interest Type" and "UI" as

A royalty interest, overriding royalty interest, net profit interest or other non-cost bearing [sic] which has been unitized, communitized or pooled under unit, communitization, pooling or similar agreements, or under orders of state or federal regulatory agencies. Exhibit A further provided:

Notwithstanding any provision thereof to the contrary, the Purchase and Sale Agreement to which this Exhibit A is attached is intended to and does cover any and all producing zones and/or formations underlying the lands described in this Exhibit A, without regard to any depth or formation restrictions set forth herein. For purposes of the preceding sentence, a zone and/or formation shall be deemed to be "producing" to the extent, as of the Effective Date, (a) there is actual production of oil, gas and/or other hydrocarbons from such zone or formation, or (b) there is a well or wells located on the lands described in this Exhibit A which are completed to such zone or formation, but such well or wells are being reworked or are otherwise temporarily shut-in.

In support of its argument that the assignment only included overrides on existing unitized zones, BP/ARCO pointed out that the listing for the Talbert property contained the designation "UI" in the "Intr Type" column, the definition of which was limited to unitized interests. Columbine contended that the assignment included all overrides affecting the lands described in the "Description of Lands"; that Exhibit A's reference to "UI" was merely intended to indicate that the described property had been included in certain units; and that this designation was not intended to limit the assignment to only unitized depths. Also, Columbine adduced testimony from its counsel that the intent of paragraph 4 was to ensure that the assignment covered all zones, irrespective of the interest types identified in the schedule of properties.

Applying Texas law, the court found that the assignment was ambiguous and that the parol evidence indicated that the parties' intent had been to assign all overrides affecting the lands set forth in the "Description of Lands" column of the schedule. The court added that neither the parties' purchase and sale agreement, nor the assignment included any language which directly referenced the reservation of overrides affecting non-unitized formations. Finally, the court reasoned that the assignor (BP/ARCO) had drafted the agreements and that any ambiguity therein "must be strictly construed against it." Accordingly, Columbine was deemed to be the owner of the overrides affecting the Talbert property.

Louisiana Oil Well Lien Act

(16) Grand Isle Shipyards, Inc. v. Black Elk Energy Offshore Operations, LLC, No. 15-129 c/w 15-154; 15-153; 15-905; 19-11825; 19-11826; 19-11827 (E.D. La. 2/12/21), 2021 WL 536292.

Grand Isle Shipyards, Inc. ("Grand Isle") performed work in connection with leases owned by Black Elk Energy Offshore Operations, LLC ("Black Elk"). Grand Isle filed a number of liens under the Louisiana Oil Well Lien Act ("LOWLA"), and filed suit against Black Elk to enforce the privileges. While the suit was pending, Black Elk assigned the leases to a third-party. Thereafter, Black Elk move to dismiss Grand Isle's claims against it. The federal district court granted the motion, explaining that Grand Isle's LOWLA claims were strictly *in rem.* Thus, although Grand Isle might have breach of contract claims against Black Elk, after the assignment of the leases, Grand Isle would not have any LOWLA claims. However, the court noted that the LOWLA privileges may be "extinguished as to the original owner, but not necessarily [as] to a new owner." That is, "to the extent [Black Elk] has alienated the wells and leases to third-parties, [Grand Isle] may pursue their LOWLA claims against those parties."

Mineral consulting agreement

(17) *Harvey v. Collins*, No. 20-840 (La. App. 1 Cir. 4/16/21), 2021 WL 1452210, *writ denied*, No. 21-683 (La. 9/27/21).

This case was a declaratory judgment action to determine whether a land man was entitled to compensation under a mineral consulting agreement ("the Agreement"). The Agreement was between DSC Associates, LLC ("DSC"), acting through Dan S. Collins, CPL & Associates, Inc. ("Collins") and the numerous family owners (the "Mineral Owners") of a large area of land in West Feliciana Parish (the "Property"). Under the Agreement, Collins was to provide various services to the Mineral Owners, including management and negotiation of mineral leasing affecting the Property. The Agreement had an initial term of one year, continuing thereafter on a month-to-month basis, until terminated by either party upon 30-days written notice.

Collins presented the Agreement to the Mineral Owners in September of 2007, and only twelve executed it. The Agreement was never dated. Over the next few years, Collins worked for the Mineral Owners as a group, negotiated a number of mineral leases, and was compensated. In March of 2018, Collins learned that some of the Mineral Owners had entered into mineral leases with Amelia, WI, LLC ("Amelia"), without his assistance. Collins filed a "Notice of Contract" in the Conveyance Records and asserted a right to compensation from the Mineral Owners.

The Mineral Owners filed suit, seeking a declaratory judgment that the Agreement was invalid and that they did not owe any compensation to Collins. In their petition, the Mineral Owners alleged that the Agreement was never fully executed. They further alleged that, between September 2007 and 2011, Collins' efforts on their behalf had primarily related to the Tuscaloosa Marine Shale ("TMS"), but that, by 2013, the TMS had become economically unfeasible. After that, Collins did not do any work for the Mineral Owners. In 2017, Collins retired, and the Mineral Owners assumed their relationship had dissolved. The district court granted summary judgment in favor of the Mineral Owners, and Collins appealed.

The Louisiana First Circuit affirmed in part. The court held that, under the Agreement, Collins was not entitled to compensation for work he did not do. The court reasoned that the Agreement did not preclude the family from negotiating mineral leases on its own (or through third parties) and that it did not specifically provide that Collins would be compensated for work performed by others. Otherwise, the court found that the Agreement was enforceable until was it terminated by either party.

Mineral lease--extension

(18) Franklin v. Regions Bank, No. 16-1152 (W. D. La. 5/12/21), 2021 WL 1907836, appeal pending.

Plaintiffs, Elizabeth Fry Franklin ("Franklin"), Cynthia Fry Peironnet ("Peironnet"), and Eleanor Baugnies de St. Marceaux ("Baugnies"), co-owned an 1,805-acre tract in Caddo Parish (the "Property"). Franklin and Peironnet had a written mineral management agreement with Regions, and Baugnies contended she had an oral mineral management agreement with Regions. The plaintiffs sued Regions, asserting that it had breached the written and oral management agreements by failing to exercise reasonable care in extending a mineral lease and that, as a result of the breach, they had lost a substantial Haynesville Shale lease bonus.

In 2004, Regions, on behalf of Franklin and Peironnet, entered in a mineral lease with Prestige Exploration affecting the Property. The lease bonus was \$100 per acre bonus and the royalty was 20%. The lease included both horizontal and vertical Pugh Clauses. Prestige assigned the lease to Matador Resources. The entire property was included in a series of 640-acre Cotton Valley units. As the lease was nearing the end of its primary term, Matador had established production from all of the Cotton Valley units, with the exception of one. Matador approached Regions about extending the lease, so it could drill the remaining Cotton Valley unit. Eventually, Regions and Matador agreed to extend the lease for eighteen months in exchange for \$75 for each of the 169 acres included within the undrilled unit. Regions signed the lease extension on behalf of Franklin and Peironnet. Baugnies signed an identical lease extension. Although the Regions representative who negotiated the lease would later testify that he only intended to grant an extension as to the 169 acres and although the bonus was calculated on that basis, the language of the extension agreement extended the lease as to all acres and depths.

In 2008, the Haynesville Shale was "discovered" and lease bonuses in the area soared. While the extension of the Matador lease was in effect, Petrohawk approached Regions about leasing the "deep rights" on the Property. Petrohawk offered a lease bonus of \$8,750 per acre and a 25% royalty, but the plaintiffs had to obtain a release from Matador as to its competing claim. The plaintiffs filed suit in state court for a declaratory judgment that the Matador lease extension was only intended to affect the 169 acres and depths above the base of the Cotton Valley and that language to the contrary in the extension was based on mutual error. A jury found no mutual error and that the extension extended to all acres and depths. The Louisiana Supreme Court eventually affirmed.

Thereafter, Franklin, Peironnet, and Baugnies sued Regions in federal court, contending that it had breached their mineral management agreement. The case was tried in April of 2021. At the outset, the district court rejected Baugnies' claims that she had an oral mineral management contract with Regions. The court found that Regions had violated the standard of care for mineral management by failing to limit the extension to the 169 acres and Cotton Valley. However, the mineral management agreement included an exculpatory

clause that precluded liability for damages caused by "any mistake in judgment of the Bank." Franklin and Peironnet contended that this language was designed to protect Regions against liability for discretionary decisions, not to protect Regions against mistakes, such as failing to observe that the language in the extension was not limited to the 169 acres or the depth in question. The court disagreed, reasoning that Regions' error was a "mistake in judgment." Thus, the exculpatory clause applied, and it precluded liability.

Good faith purchaser

(19) *Hill v. TMR Exploration, Inc.*, No. 20-667 (La. App. 1st Cir. 1/27/21), 317 So. 3d 801. *writ denied*, 315 So. 3d 1273 (La. 5/25/21).

TMR Exploration, Inc. ("TMR"), drilled and produced a directional oil well on a leasebasis. TMR assigned the well and lease to Park Exploration, Inc. ("Park"), which later assigned the same to Vitol Resources, Inc. ("Vitol"). Sunoco purchased the production from the well. After several years of production, it was discovered that, due to a surveying error, the well's bottom location was on an adjacent, unleased tract owned by the Hill family. The Hills sued TMR, Park, and Vitol for trespass and, later, added claims against Sunoco.

Sunoco filed a motion for summary judgment, contending it was a good faith purchaser of the oil under Civil Code articles 522 through 524. Article 522 states that a "transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent." Article 523 states that an "acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner." And, Article 524 states that the "owner of a lost or stolen movable may recover it from a possessor who bought it in good faith . . . from a merchant customarily selling similar things," but only after the owner reimburses the possessor for "the purchase price." Finding that Sunoco was a good faith purchaser of the production, the district court granted Sunoco's motion for summary judgment and dismissed the Hills' claims against it. The Hills appealed to the Louisiana First Circuit Court of Appeal, which affirmed.

On appeal, The Hills argued that Civil Code article 2452 and Mineral Code article 210 controlled. Civil Code article 2452 states that the "sale of a thing belonging to another does not convey ownership." Mineral Code article 210 states:

A purchaser of minerals produced from a recorded lease granted by the last record owner holding under an instrument translative of title to the land or mineral rights leased is fully protected in making payment to any party in interest under the lease unless and until a suit is filed testing title to the land or mineral rights embraced in the lease and the purchaser receives notification of it by registered mail. The purchaser is not entitled to this protection unless he has filed for registry in the conveyance records of the parish in which the land

subject to the lease is located notice that the minerals produced have been and will be purchased by him. According to the Hills, Mineral Code article 210 prevailed over the Civil Code's suppletive good faith purchaser provisions, and, since Sonoco had not filed the requisite notice of purchase, it was not entitled to the protection of that article. The appellate court discarged purchase, it was not entitled to the protection of that article. The appellate court disagreed, explaining that the "purpose and intent of [Mineral Code article 210] is to address rental and royalty payments due to parties holding an interest in the leased property when a dispute or defect in the title exists." Here, since the Hills' claim arose from subsurface, trespass Mineral Code article 210 was not implicated.

The court further explained that the Hill's claims were based on the flawed premise that they were owners of the oil in situ. However, under Louisiana law, fugacious substance, like oil and gas, are not owned until they are reduced to possession. Although the Hills did not have a cause of action against Sonoco, a good faith purchaser, the court remarked that they did appear to have a claim for subsurface trespass against TMR, Park, and Vitol, and, according to the court, the value of the oil produced by those defendants might be an appropriate measure of damages for that claim.

Public records doctrine

TSS Properties v. Ray-Bayou, LLC, No. 20-533 (La. App. 3d Cir. 9/22/21), 2021 WL (20)4303332, writ denied, No. 21-1531 (La. 12/21/21).

Ray-Bayou, LLC ("Ray-Bayou"), sold certain property in Lafayette Parish (the "Property") to TSS Properties, LLC ("TSS"). TSS filed suit to declare a servitude of passage previously granted by Ray-Bayou to adjacent property owner, M & G Property Holdings, LLC ("M & G"), void. On January 6, 2017, Ray-Bayou had purportedly granted a written servitude of passage to M & G, but the document was not recorded until September 8, 2017. On the same day, Ray-Bayou sold the Property to TSS, but the deed of sale was not recorded until September 12, 2017.

TSS moved for summary judgment, contending that the servitude was invalid because (i) the written agreement did not contain a sufficient property description to place a reasonable third party on notice of the existence of the servitude and (ii) the servitude agreement was not recorded until after the deed from Ray-Bayou to TSS was executed. The trial court entered summary judgment for TSS, declaring the servitude invalid. The defendants appealed.

The Louisiana Third Circuit Court of Appeal explained that, under the public records doctrine, because nothing was of record concerning the sale of the property when the servitude agreement was recorded, M & G, the grantee, could rely on the absence of any record negating the effects of the instrument. In other words, under the public records doctrine, it was irrelevant that the deed of sale between Ray-Bayou and TSS was executed prior to the recordation of the servitude agreement. What mattered were the relative dates of recordation of the two instruments. However, the substance of the servitude agreement

presented a problem. The court explained:

The [servitude agreement] was recorded by Ray-Bayou at 3:55:05 p.m. on September 8, 2017. The September 8, 2017 cash sale between Ray-Bayou and TSS was recorded by Ray-Bayou on September 12, 2017. Although the [servitude agreement] refers to a separate servitude agreement and states that the description of the property affected is shown in the "Right of Passage" attached as exhibit "A," no such documents were attached to the [servitude agreement] or recorded in the [conveyance records]. Moreover, the servitude agreement contains no description of the property over which Ray-Bayou grants a servitude, nor is there a separate document containing a property description. Even reading the [servitude agreement] alongside or in conjunction with the cash sale from Ray-Bayou to TSS, one cannot glean from the public record that a servitude existed over the property sold to TSS.

Finally, although the cash sale from Ray-Bayou to TSS included a clause stating that the sale was subject to "recorded" servitudes, the servitude in question was not recorded at that time the sale was confected. Accordingly, the court affirmed summary judgment for TSS.

(21) Covey Park Gas, LLC v. Bull Run Acquisitions II, LLC, No. 53,670 (La. App. 2d Cir. 1/13/21), 310 So. 3d 777, writ denied, No. 21-235 (La. 4/7/21).

Beaver River Resources ("Beaver") and Bull Run Acquisitions II LLC ("Bull Run") contested ownership of certain undivided mineral interests. The property at issue was two tracts in the Southwest Quarter of Section 32, Township 14 North, Range 15 West, DeSoto Parish, Louisiana. The common ancestor of both claimants was "Mrs. Brewer." Mrs. Brewer also owned minerals in a third tract in the Southeast Quarter of Section 32. Mrs. Brewer died in 2005, and her judgment of possession placed Bank of America, as trustee, in possession of her Louisiana mineral interests. The judgment was filed in the suit records, but not the conveyance records.

Bank of America purported to sell the minerals to Beaver in Oil and Gas Deed, effective September 1, 2008. However, the deed only described minerals in the *Southeast* Quarter of the section. In 2018, Bank of America re-open Mrs. Brewer's succession and asked the court to distribute all of her remaining interest in the minerals in Section 32 to various beneficiaries. The court entered a judgment to that effect, and the judgment was recorded in the Conveyance Records. Subsequently, Bull Run purchased the interests in the Southwest Quarter of the section from the beneficiaries and sent a demand under La. R.S. 31:137 to Covey Park for the payment of royalties. Covey Park, who was already paying royalties to Beaver, commenced a concursus proceeding.

Bull Run filed a motion for summary judgment, contending that the Beaver Oil and Gas Deed was clear on its face and did not convey any interest in the Southwest Quarter of the Section. In opposition, Beaver conceded this error, but argued that both it and Bank of an of Mrs. Brewer's interest in the Section. In support of its enver presented the petition to close Mrs. Brewer's succession and the unent of possession, both of which described all three tracts. Beaver argued that the discrepancy between these documents and the Oil and Gas Deed into Beaver should have placed third parties on notice that the description in the deed was in error. Beaver argued that the deed should be reformed accordingly and that the reformatted deed would relate back to its date of execution. Finally, Beaver claimed that Bull Run was in bad because it "took advantage" of the mistake in the deed. The district court udgment for Bull Run.

when such instruments, as written, do not express the true contract of the parties," but may not be used to prejudice the rights of third parties who have relied upon the face of the public records. The court remarked that the documents Beaver claimed should have alerted third parties to the error in the Oil and Gas Deed, *i.e.*, the petition to close the succession and the judgment of possession, were not filed of record. According to the court: "Documents filed only in a suit record, and not in the conveyance records, do not place third parties on notice." In any event, the court found that any potential action for reformation has prescribed by the passage of 10 years. The court reasoned

Beaver correctly shows that the prescriptive period does not begin to run until the party seeking reformation discovers or should have discovered the error. However, Beaver's theory of the case is that the description in the Oil and Gas Deed is so deficient that Bull Run should have recognized the error on the face of the document; if this is so, then it was facially deficient enough to place Beaver on the same notice, on the date of execution. In that event, prescription has tolled.

Notarial Act of Correction

(22)TSS Properties v. Ray-Bayou, LLC, No. 20-533 (La. App. 3d Cir. 9/22/21), 2021 WL 4303332, writ denied, No. 21-1531 (La. 12/21/21).

Notarial acts of correction are often used improperly to correct errors and omissions. Every lawyer, landman, and notary should take note of the following from the Louisiana Third Circuit Court of Appeal:

La. R.S. 35:2.1 provides that a clerical error in a notarial act affecting movable or immovable property or any other rights, corporeal or incorporeal, may be corrected by an act of correction executed by the person who was the notary or one of the notaries before whom the act was passed, or the notary who actually prepared the act containing the error, but with the proviso that it must be passed before a notary and two witness, *i.e.*, it must be an
authentic act. Further, the statute provides that the act of correction executed in compliance with the section shall be given retroactive effect to the date of recordation of the original act. "However, the act of correction shall not prejudice the rights acquired by any third person before the act of correction is recorded where the third person reasonably relied on the original act." La. R.S. 35:2.1(B). Our jurisprudence is clear that an affidavit of correction is permissible only to correct "clerical errors" which do "not alter the true agreement and intent of the parties" and that it cannot effect any substantive change to the original document.

Sinkhole

(23) *Pontchartrain Natural Gas System v. Texas Brine Co., LLC*, No. 18-1249 (La. App. 1st Cir. 12/20/20), 317 So. 3d 715, *writ denied*, No. 21-382 (La. 6/8/21).

This is one of numerous lawsuits involving the Napoleonville Salt Dome sinkhole in Assumption Parish. This suit was filed by owners and operators of natural gas pipeline and storage facilities that were affected by the sinkhole. The plaintiffs alleged that the sinkhole was caused by Texas Brine, which operated a brine well in the salt dome. Texas Brine third-partied a number of entities, asserting both tort and contract claims.

In September of 2017, a "Phase 1" trial was held to determine the cause of the sinkhole and to allocate fault among the parties. The trial court concluded that the sinkhole was caused in part by Texas Brine, whose brine well had eroded the wall of the salt dome to a point of collapse, and in part by nearby oil and gas operations. The court allocated 50% fault to various Occidental Petroleum entities (the "Oxy Entities"), which were the lessors of brine well and the operator of the nearby oil and gas well; 25% fault to Texas Brine; 10% fault to United Brine Services Company, LLC ("UBS")(a company related to Texas Brine); 15% to Legacy Vulcan (Texas Brine had assigned the salt lease to Legacy Vulcan although Texas Brine continued to operate the brine well).

On appeal, the Louisiana First Circuit Court of Appeal considered the effect of an arbitration agreement between the Oxy Entities and Texas Brine. The court held that, despite the arbitration agreement, it was required to allocate 100% fault at the conclusion of the trial. The court did note that any enforceable judgment for contribution or indemnity between the Oxy Entities and Texas Brine would have to be decided in accordance with these parties' arbitration agreement.

With respect to causation, the court concluded that it was manifestly erroneous for the trial court to conclude that the nearby oil and gas operations caused the sinkhole. Accordingly, the court then reallocated the fault as follows: 45% to Texas Brine, 30% to Occidental Chemical Corporation (the Oxy Entity associated with the brine operation), 15% to Legacy Vulcan, and 10% to UBS.

Deepwater Horizon

(24) In re Oil Spill by Oil Rig "Deepwater Horizon" in the Gulf of Mexico, 496 F. Supp. 3d 989 (E.D. La. 2020).

BP moved to dismiss 115 cases brought by Mexican nationals who sought damages related to the Deepwater Horizon incident under the Oil Pollution Act of 1990 ("OPA") and general maritime law. The court took up the OPA claims first. The court observed that OPA does allows for recovery by foreign claimants, but a foreign claimants must satisfy two additional requirements to recover. First, a foreign claimant must not have "been otherwise compensated for the . . . damages." Second, a treaty or executive agreement between the United States and the foreign claimant's home country must provide for a comparable remedy for United States claimants in the courts of the foreign claimant's home country.

There was no showing that the Mexican claimants had been otherwise compensated, but they were unable to prove that Mexico offered a similar remedy to United States claimants. The claimants pointed to the United States-Mexico-Canada Agreement ("USMCA") and the North American Agreement on Environmental Cooperation ("NAAEC"). The court determined that the USMCA did not go into effect until after the oil spill. In any event, neither the USMCA, nor the NAAEC provided a comparable remedy. Thus, the Mexican claimants could not recover under OPA. Finally, the court noted that the OPA expressly displaces claims for oil-spill losses under general maritime law. Thus, the court dismissed the claimants' cases.

Federal leasing moratorium

(25) Louisiana v. Biden, No. 21-778 (W.D. La. 6/15/21), 2021 WL 2446010, appeal filed.

After his inauguration, President Biden immediately issued various executive orders affecting the oil and gas industry, including one that ordered the United States Department of Interior to stop granting oil and gas leases affecting federal lands until further notice. The president characterized the order as a "pause" on federal leasing, but did not specify how long the moratorium would last. The president explained that the order would fight climate change by stopping greenhouse gases emission from the production of oil and gas.

Thirteen states, including Louisiana, filed suit against the Biden administration, contending that the president lacks authority to unilaterally stop federal leasing. The states contended that federal legislation, including the Outer Continental Shelf Lands Act ("OCSLA"), provided that the leasing of federal lands for oil and gas development was a matter of public policy. Alternatively, the states argued that, even if the president did have authority to pause federal leasing, he did not follow the proper procedure in doing so. For example, OCSLA requires the Department of Interior to publish a schedule of proposed federal oil and gas leases in the Federal Register and to consult with other federal agencies and the impacted state. Any revision to this schedule requires re-publication and further consultation. Finally, the states argued that a moratorium on federal leasing requires review under the National

Environmental Policy Act.

On June 15, 2021, the Honorable Terry Doughty, United States District Judge for the Western District of Louisiana, granted the petitioning states a preliminary injunction, prohibiting the Biden administration's pause on federal leasing. In so ruling, the court reasoned that the states were likely to prevail on the merits. This ruling is currently on appeal to the United States Fifth Circuit Court of Appeals.

Comparing Louisiana and Texas Remedies for Improper Lease Administration

Once an oil or gas well is drilled and completed, a host of oil and gas lease clauses and statutory provisions are triggered. If the operator of a well does not properly administer its leases going forward, it could be subject to penalties and even lease cancellation. Thus, an understanding of the proper administration of a producing lease is imperative.

This paper includes a discussion of several issues pertinent to administration of an oil and gas lease, including shut-in payments, division orders, untimely or improper royalty payments, and overpayment of royalty. Because so many practitioners these days work not only in Louisiana, but also in Texas, this paper will compare and contrast the Louisiana and Texas rules on these topics.

Shut In Payments

Generally, natural gas cannot be produced unless there is a pipeline connected to a well. This is because, unlike oil, natural gas cannot be stored in tanks or trucks, but must instead be transported in a pipeline. It does not make economic sense for an operator to pay for a pipeline connection to a well before it is known whether the well will produce at a high enough level to justify such an expense. As such, operators are often left in the position of having a well that is capable of production, but unable to produce until a pipeline is connected to the well. Absent a shut-in clause, the oil and gas lease would terminate at the end of its primary term for lack of production.

The early oil and gas lease forms in both Louisiana and Texas did not contain a savings clause addressing this situation. The jurisprudence in both states includes cases where operators spend considerable time and money to make a well capable of production but were unable to maintain their leases beyond the primary term because they were unable to connect the well to a pipeline before the end of the primary term. Because lease termination is a result of a lack of actual production after the primary term in this circumstance, the shut-in clause evolved to allow a lessee to perpetuate its lease until it can put in place the infrastructure to produce the gas from its well.

All modern oil and gas lease forms contain some version of a shut-in clause. It goes without saying that shut-in clauses are creatures of contract, so there is no "standard" shut-in

clause in either Louisiana or Texas. However, there are some commonalities among most shutin clauses. First, the clauses speak to the trigger, or set of circumstances, that allows an operator to perpetuate its lease without actual production. Leases speak of events such as a "lack of market or marketing facilities," "lack of an available pipeline," or "governmental restrictions." Some forms are less specific, requiring only that there be a well capable of production and that "minerals are not being produced," but without specifying the reason for the lack of actual production.

Shut-in clauses will also describe the amount of the payment, and when such payment is due. Some lease forms state that lessee must resume making delay rental payments, or some percentage of a delay rental payment. Others quantify the payment in terms of dollars per acre. As discussed below, in Louisiana, some lease forms consider the shut-in payment to be in the nature of a royalty, and others consider it to be a rental. This classification has consequences in terms of who is entitled to receive the payment, and the penalty for nonpayment. Finally, most shut-in clauses state that shut-in payments can perpetuate an oil and gas lease only for a certain period of time, typically two to five consecutive years.

To whom should shut-in payments be made?

Many common oil and gas lease forms used in Louisiana classify a shut-in payment as either a rental or a royalty. Lease forms that require the payment of delay rentals during the primary term typically provide that shut-in payments are made by resuming rental payments in the manner provided for in the delay rental clause in the lease. Other lease forms, particularly those that provide for paid-up primary terms, consider the shut-in payment to be in the nature of a royalty, and quantify the payment in terms of a certain amount per acre.

With respect to a lease that characterizes shut-in payments as royalties, the parties entitled to be paid royalties are entitled to shut-in payments, which is typically the mineral owner. However, a landowner or an owner of a mineral servitude can convey a royalty interest¹ to a third party, retaining the other incidents of mineral ownership.² If there is a Mineral Code Article 80 royalty owner, then that party would be entitled to receive its appropriate share of such payments.³

If a lease characterizes shut-in payments as rentals, then all payments would be made to the party entitled to receive delay rentals, which is typically the mineral owner. If there is

¹ LA. REV. STAT. § 31:80, *et seq*.

² Such a royalty interest is sometimes referred to as an "Article 80" royalty, and is distinguished from the royalty interest owed to a mineral lessor. This kind of royalty interest is referred to as a non-participating royalty interest ("NPRI") in Texas and other states.

³ Davis v. Laster, 138 So. 2d 558 (La. 1962).

an executive right owner, then further analysis is necessary to determine who is entitled to the shut-in rentals. In Louisiana, unless the contract creating the executive right provides otherwise, the executive right owner is entitled to receive bonus and delay rentals.⁴ Therefore, an executive right owner is entitled to receive shut-in rentals, unless the contract creating the executive right states that the executive right does not include the right to receive rentals.

Sometimes parties include a directed payment provision in the lease, which directs a lessee to pay rentals or royalties to someone other than the party otherwise entitled to receive such payments. In that event, a lessee would be required to take that into account when identifying the proper party to receive shut-in payments, whether classified as rentals or royalties.

Texas law appears to be similar to Louisiana law on this topic. If a lease form characterizes shut-in payments as royalties, then the parties entitled to receive royalties, be they mineral owners or NPRI owners, should receive the shut-in payments. Conversely, parties entitled to receive delay rental payments should be paid shut-in payments that are characterized as rentals. Unlike Louisiana, which has traditionally had a geographic differences in lease form preferences, with shut in royalties being more common in North Louisiana and shut-in rentals being more common in South Louisiana, in this author's experience, the vast majority of Texas oil and gas lease forms consider shut-in payments to be royalties, regardless of the location of the leased lands.

What if shut-in payments are not timely and properly made?

Louisiana law provides that if shut-in payments are characterized as royalties, then the failure to timely and properly make them will not result in the automatic termination of an oil and gas lease.⁵ As discussed below, Mineral Code Article 137 provides that the failure to pay royalties does not result in automatic termination of a lease. Rather, there are notice and delay requirements before a court can consider terminating a lease for failure to pay royalties. It follows, then, that because failure to make a royalty payment does not automatically terminate a lease, the failure to make a shut-in royalty payment would also not automatically terminate a lease. In contrast, if a lease form considers shut-in payments to be rentals, then failure to make timely and proper payment will likely result in the automatic termination of the lease, because most rental bearing lease forms are drafted such that failure to make a rental payment is a resolutory condition.

⁴ LA. REV. STAT. § 31:105.

⁵ Acquisitions, Inc. v. Frontier Explorations, Inc., 432 So. 2d 1095 (La. Ct. App. 3d Cir. 1983).

The analysis in Texas requires a review and analysis of the shut-in clause to determine the consequence for failure to make the shut-in payment. One must determine whether the relevant language states that the payment is optional or obligatory. Oftentimes this notion is expressed in terms of whether the shut-in clause creates a condition or a covenant.

Lease forms that treat a shut-in payment as optional typically provide, either expressly or by implication, that the lease will terminate unless the optional payment is made. This type of shut-in clause creates a condition, which if not met will result in the automatic termination of the lease. Two examples of such an optional clause are as follows:

If, at any time after the expiration of the Primary Term of this Lease, all the wells on the Leased Premises, or lands pooled with it, are shut in and this Lease is not otherwise maintained in effect, Lessee may pay or tender, by its check or draft, as shut in royalty, and amount equal to One Dollar (\$1.00) for each acre of Land then covered by this Lease.

If, after the expiration of the Primary Term, there is a well or wells on the Land or on lands pooled therewith, capable of producing oil or gas, and all the wells are shut-in, this Lease shall nevertheless continue in force for so long as the wells are shut-in and Lessee pays the shut-in royalty provided below...While there is a gas well on this Lease, or on acreage pooled therewith, but gas is not being sold or used, Lessee shall pay or tender annually at the end of each yearly period during which such gas is not sold or used, as royalty, an amount equal to the delay rental, and while said royalty is so paid or tendered this Lease shall be held as a producing Lease.

Lease forms that treat a shut-in payment as obligatory usually do not result in automatic termination if the payment is not made. Rather, the usual remedy is an action to recover the unpaid shut-ins.

An example of a lease form that treats a shut-in payment as obligatory is as follows:

If, after the expiration of the Primary Term, there is a well or wells on the leased premises or on lands pooled therewith, capable of producing oil or gas, and all such wells are shut in, this lease shall nevertheless continue in force for so long as said wells are shut in. In such event, Lessee agrees to pay, as shut-in royalty, the sum of ten dollars (\$10.00) per acre for each acre of land then covered by this lease. Failure to pay such shut-in royalty shall not terminate this lease, but shall render Lessee liable for the amount due.

Must a notice or memorandum of oil and gas lease describe the shut-in clause?

As every Louisiana oil and gas attorney knows, an oil and gas lease is a real right⁶ and must be recorded in the conveyance records in order to be effective against third persons.⁷ The exception to this rule is found in Louisiana Revised Statute § 9:2742, which provides that a notice of lease can be recorded in lieu of the lease itself if the notice contains the required elements set out in the statute. A properly drafted and recorded notice of lease will result in the unrecorded lease having effect against third persons. The statute requires that a notice include things like the signature of both the lessor and lessee,⁸ the name and address of the lessor and lessee, a declaration that the property is leased, a description of the leased property, the date of the lease, and its term, including any extensions or renewals of its term.

The statute applies to oil and gas leases, but requires that the notice include, in addition to all other requirements, the primary term of the lease, and "any additional period during which the lease may be maintained by the payment of rentals." If a Louisiana oil and gas lease provides that shut-in payments can be made by resuming delay rental payments, it follows that such a provision should be included in a notice of lease as an "additional period during which the lease may be maintained by the payment of rentals."

In this author's experience, it is not uncommon for parties to omit from a notice of lease a statement about the period of time in which the lease can be maintained by shut-in rental payments. The consequence for this omission is not clear. It could be that a court would conclude that because the notice of lease does not fully comply with the statute, it does not serve as notice of the unrecorded lease, so the lease does not have effect against third persons. Alternatively, a court could decide that the unrecorded lease is effective against third persons except for the shut-in provision, which cannot bind third parties because it was not included in the notice. Because § 9:2742 is an exception to the general rule that an oil and gas lease must be recorded to have effect against third persons, this author believes that a court would mostly

⁶ LA. REV. STAT. § 31:16.

⁷ LA. CIV. CODE ART. 3338.

⁸ In this author's experience, it is rare that a lessee signs an oil and gas lease, but LA. REV. STAT. § 9:2742 requires the lessee's signature.

⁹ LA. REV. STAT. § 9:2742(E).

likely strictly construe the statute and require the notice to contain each and every element to have any effect at all. However, to date there is no reported decision on this issue.

The Texas public recordation statutes are different from Louisiana. Whereas Louisiana is a "race to the courthouse jurisdiction," Texas is a pure "notice" jurisdiction.¹⁰ Simply stated, the Texas rule is that a deed is void as to a subsequent purchaser for value who is without "notice."

In "notice" states such as Texas, an instrument does not need to be recorded in the deed records to be effective against third persons. A deed is effective against a party who has notice of its existence. There are different types of "notice", including constructive notice, actual notice, and inquiry notice. Actual notice is a question of fact and requires actual awareness or direct knowledge of a deed. In contrast, constructive notice results when a deed is properly acknowledged and recorded in the deed records. Inquiry notice is knowledge of a fact that would cause a reasonably prudent buyer to investigate further.¹¹

Based on the foregoing, a memorandum or notice of oil and gas lease in Texas need have only enough detail so that a reasonably prudent buyer would investigate the matter further. There is no list of specific elements that must be included in a Texas memorandum or notice of lease, but in this author's experience, it is common to include the names of the parties, a legally sufficient property description, a statement that the property is leased, and the length of the primary term. Because a memorandum or notice does not have to include particular lease provisions, it would not have to include information about how the lease can be perpetuated by making shut in payments.

Division Orders

After a well begins producing, a lessee must timely pay its lessors their royalties. Prior to that, many lessees prepare division orders and request that their lessors sign them before payments are released. There are significant differences between Louisiana and Texas law pertaining to division orders.

<u>Louisiana</u>

¹⁰ See TEXAS PROP. CODE ANN. § 13.001, et seq.

¹¹ The duty of inquiry extends not only to an unrecorded instrument mentioned in a recorded instrument, but also to an unrecorded instrument mentioned in a nurecorded instrument mentioned in a recorded instrument. *See* Westland Oil Development Co. v. Gulf Oil Corp, 637 S.W.2d 903 (Tex. 1982) (holding that a leasehold assignee had a duty to inquire as to an unrecorded letter agreement referenced in an unrecorded operating agreement that was referenced in the recorded leasehold assignment.).

Louisiana law defines a division order as "an instrument setting forth the proportional ownership in oil or gas, or the value thereof, which division order is prepared after examination of title and which is executed by the owners of the production or other persons having authority to act on behalf of the owners thereof."¹²

Although it is customary for a lessee to ask for a division order, it may not withhold royalty payments otherwise due simply because the royalty owner refuses to sign a division order.¹³ Withholding royalties otherwise due solely because a lessor has not executed a division order can result in liability by a lessee for damages equal to double the amount of royalties due, plus legal interest on that sum due from the due date, and reasonable attorney's fees.¹⁴

A division order must not alter or amend the terms of an oil and gas lease, otherwise, the division order will be invalid to the extent of the difference between the division order and lease provision.¹⁵ Therefore, in the event of a conflict between a division order and an oil and gas lease, the lease will prevail.

<u>Texas</u>

Texas law defines a division order as "an agreement signed by the payee directing the distribution of proceeds from the sale of oil, gas, casinghead gas, or other related hydrocarbons."¹⁶ In contrast to the Louisiana rule, Texas law provides that royalty payments can be withheld if the lessee does not receive a signed division order. ¹⁷ The statute provides that if a division order contains only the following provisions, it must be signed by a payee as a prerequisite to receiving royalty payments:

- (A) the effective date of the division order, transfer order, or other instrument;
- (B) a description of the property from which the oil or gas is being produced and the type of production;
- (C) the fractional and/or decimal interest in production claimed by payee, the type of interest, the certification of title to the share of production claimed, and, unless

¹² LA. REV. STAT. § 31:138.1(A).

¹³ LA. REV. STAT. § 31:138.1(C).

¹⁴ LA. REV. STAT. § 31:138.1(D).

¹⁵ LA. REV. STAT. § 31:138.1(B).

¹⁶ Tex. Nat. Res. Code Ann. § 91.401.

¹⁷ Tex. Nat. Res. Code Ann. § 91.402(c).

otherwise agreed to by the parties, an agreement to notify payor at least one month in advance of the effective date of any change in the interest in production owned by payee and an agreement to indemnify the payor and reimburse the payor for payments made if the payee does not have merchantable title to the production sold;

- (D) the authorization to suspend payment to payee for production until the resolution of any title dispute or adverse claim asserted regarding the interest in production claimed by payee;
- (E) the name, address, and taxpayer identification number of payee;
- (F) provisions for the valuation and timing of settlements of oil and gas production to the payee; and
- (G) a notification to the payee that other statutory rights may be available to a payee with regard to payments.¹⁸

A question that has been addressed by Texas courts is whether a division order that is inconsistent with the relevant oil and gas lease is still enforceable. The answer, in some cases is "yes," which is in contrast to the Louisiana rule that a division order is invalid to the extent that it contains provisions inconsistent with the relevant oil and gas lease.

The Texas Supreme Court, in *Exxon Corp. v. Middleton*, announced the so-called "binding until revoked" rule.¹⁹ In the case, the leases in question provided for royalties to be paid based on market value. The operator entered into long term gas sales contracts, and furnished division orders that said that royalties were to be valued based on the amount realized under the long term sales contracts. It is clear that the division orders changed the royalty provision of the oil and gas leases, and the royalty owners argued that as a result the division orders were not binding on them. The court disagreed, stating that the division orders were binding on the royalty owners, at least during the time when they were being acted upon. The division orders were binding until they were revoked when the royalty owners sued the operators.

¹⁸ Id.

¹⁹ Exxon Corp. v. Middleton, 613 S.W.2d 240 (Tex. 1981).

The Texas Supreme Court's decision in Gavenda v. Strata Energy, Inc.,²⁰ provides guidance for circumstances in which a division order will not be enforceable, and can be revoked retroactively. In that case, the division order was prepared based on an erroneous interpretation of a reservation of a non-participating royalty interest in the lessor's chain of title. The lessee prepared a division order based on a title opinion that quantified the reservation as being in the amount of 1/2 of the lease royalty (or 1/2 of 1/8), but the proper interpretation is that the royalty was in the amount of 1/2 of production (50% of 8/8). The lessor signed the division order, and accepted royalty payments in an amount much lower than it was entitled, with the lessee benefiting from the underpayment. The court said that the general "binding until revoked" rule is based upon detrimental reliance. As justification for this, the court cited an example where an operator pays out the correct amount of total proceeds, but overpays some royalty owners and underpays others. In such a situation, the underpaid royalty owners have a remedy against the overpaid royalty owners, but not against the operator. Allowing an underpaid royalty owner in this circumstance to recover from the operator would subject the operator to the risk of double payment. The facts in *Gavenda* are distinguishable. In this case, the operator benefited from the error in the division order, and the court found that to be unacceptable, and held that the operator was liable to the lessee for the underpaid amounts, despite the fact that the lessor signed a division order containing the lower royalty fraction.

Timely and Proper Royalty Payment

Both Louisiana and Texas have statutes that govern the rights and obligations of royalty owners and lessees of oil and gas leases. Louisiana's statute does not provide for a specific time period in which royalties must be paid, but the Texas statute does. Both statutes provide for certain penalties in the event of untimely or improper payment, and both require a royalty owner to make formal demand before filing a lawsuit, giving a lessee time in which to make the overdue royalty payment or take other action.

Louisiana

Louisiana law does not provide for a specific time period in which royalty payments must be made, but does require that royalties be paid within a reasonable time period customary in the industry. Louisiana Revised Statute § 31:123 states that royalties are considered "rent", and that a lessee must make payment according to the terms of the oil and gas lease, or if the lease is silent than according to the custom and practice of the industry. In

²⁰ Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986).

this author's experience, most leases in Louisiana do not provide for a specific time period in which to make royalty payment. However, Louisiana courts will enforce the penalties provided for in oil and gas leases if royalties are not timely and property paid.²¹

Louisiana Revised Statute § 31:137 provides that "[i]f a mineral lessor seeks relief for the failure of his lessee to make timely or proper payment of royalties, he must give his lessee written notice of such failure as a prerequisite to a judicial demand for damages or dissolution of the lease."²²

Comparing LA & TX Remedies

Not every communication between a lessor and lessee about royalty payments is sufficient notice under this state. The inquiry into the adequacy of the notice is fact intensive, and is determined on a case by case basis. A simple inquiry by a royalty owner requesting information about production is not sufficient.²³ Further, the communication must be more than "the mere recitation of the lessee's contractual and statutory duties to pay royalties," and it must be specific enough to "reasonably alert the lessee and to allow for an appropriate investigation of the problem by the lessee."²⁴

Once a lessee receives adequate notice of untimely or improper royalty payments, Louisiana Revised Statute § 31:138 requires the lessee to either pay the royalties due or state in writing a reasonable cause for nonpayment within 30 days of receipt.

What constitutes a "reasonable cause for nonpayment" will depend on the particular facts and circumstances. A delay of four months and two days was not deemed unreasonable in circumstances where the operator was waiting for the Office of Conservation to issue an order, causing the unit to be surveyed, causing title work and title curative to be completed, preparing division orders, and otherwise working diligently to prepare the necessary information so that it could properly distribute royalty proceeds.²⁵ Failure to make a payment because of oversight has also been found to be reasonable, at least when the amount involved was not large.²⁶

It is not possible to articulate all of the possible reasonable reasons for nonpayment of royalties, but one case²⁷ provided several factors relevant to the determination, namely (1) the

²¹ Stream Family Ltd. Partnership v. Marathon Oil Co., 09-561 (La. App. 3 Cir. 12/23/09), 27 So. 3d 354, writ denied, 10-196 (La. 4/16/10), 31 So. 3d 1064.

²² LA. REV. STAT. § 31:137.

²³ See Bailey v. Franks Petroleum, Inc., 479 So. 2d 563 (La. Ct. App. 1st Cir. 1985).

²⁴ Rivers v. Sun Exploration & Prod. Co., 559 So. 2d 963 (La. Ct. App. 2d Cir. 1990).

²⁵ Canik v. Texas International Petroleum Corp., 308 So. 2d 453 (La. Ct. App. 3d Cir. 1975), writ denied 310 So. 2d 850 (La. 1975).

²⁶ Fuller v. Franks Petroleum, Inc., 501 So. 2d 1024 (La. Ct. App. 2d Cir. 1987).

²⁷ Bayou Boullion Corp. v. Atlantic Richfield Co., 385 So. 2d 834 (La. Ct. App. 1st Cir. 1980).

Comparing LA & TX Remedies

length of the period in which royalties were not paid; (2) the amount involved; (3) special circumstances outside the control of the lessee; (4) the lessee's motive; (5) when and under what circumstances did the lessor seek or demand royalty payments; and (6) whether the person to whom the royalty was owed knew about the industry or was the footing unequal.

Depending on the conduct of the lessee after receipt of a notice alleging improper or untimely payment of royalties, there are a number of possible remedies that could apply.

If a lessee pays the royalties due, the lessor can still sue the lessee, but the remedy of lease termination is not available unless the original failure to pay was fraudulent.²⁸ In such a lawsuit, however, the court can award as damages "double the amount of royalties due, interest on that sum from the due date, and a reasonable attorney's fee, provided the original failure to pay was either fraudulent or willful and without reasonable grounds."²⁹ If the original failure to pay was the result of "mere oversight or neglect," damages are limited to interest on the royalties computed from the date due, and a reasonable attorney's fee if the interest is not paid within thirty days of written demand.³⁰

If, after receipt of a proper notice, a lessee does not pay the royalties due, or does not state a reasonable cause for failing to pay the royalties, a court can award damages in the amount of "double the amount of royalties due, interest on that sum from the date due, and a reasonable attorney's fee regardless of the cause for the original failure to pay royalties."³¹ A court may also dissolve the lease in its discretion.³² The use of the language "double the amount of royalties due" is not entirely clear. On one hand, it could mean that the intent of the statute was to award treble damages, or the amount of the unpaid royalties plus a penalty of two times the amount of unpaid royalties. On the other hand, it could mean that the damages are limited to the amount of unpaid royalties plus a penalty of the amount of unpaid royalties. This issue was clarified by a recent Louisiana Supreme Court decision, which held that the statute means that "double the amount of royalties, or a total award of twice the amount of unpaid royalties.³³

Although the statute requires a lessee to either pay the royalties due or state in writing a reasonable cause for non-payment within thirty (30) days of receipt of a notice pursuant to Louisiana Revised Statute § 31:137, there is a third option available in certain circumstances. If

²⁸ LA. REV. STAT. § 31:139.

²⁹ Id.

³⁰ Id.

³¹ LA. REV. STAT. § 31:140.

³² Id.

³³ Gloria's Ranch, L.L.C. v. Tauren Expl., Inc., 2017-1518 (La. 06/27/18); 252 So. 3d 431.

the lessee is faced with a dispute as to payment of royalties, the lessee could institute a concursus action. The Louisiana Code of Civil Procedure provides that concursus may be authorized where "two or more persons having competing or conflicting claims to money, property, or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding."³⁴ In this way, a lessee may be protected from damages, legal interest, and attorneys' fees for its failure to pay royalties.

For instance, in *Cimarex Energy Co. v. Mauboules*, the Louisiana Supreme Court affirmed that a lessee was allowed to use a concursus to interplead funds into the registry of the Court, based upon competing claims to royalty payments.³⁵ After a royalty owner made demand on Cimarex for nonpayment of royalties following a dispute over royalty interests, Cimarex filed a concursus action to allow the court to properly determine ownership and payment. The Court of Appeals affirmed the trial court's decision that Cimarex improperly instituted a concursus action, that concursus was not lawful under the Louisiana Mineral Code, and that it should not receive immunity. On appeal, the Louisiana Supreme Court held that the concursus proceeding was a proper vehicle for adjudicating the disputed payments. The Court considered that the trial court erred "in imposing a duty on Cimarex to investigate or evaluate the relative strengths and merits of the underlying claims," and that "[t]he imposition of this duty undermines the purpose of the concursus proceeding."³⁶

Accordingly, a party properly invoking concursus can be "insulated from statutory penalties based on an alleged failure to pay in response to statutory notice."³⁷ In addition, the *Cimarex* decision provides that a party that invokes concursus may be a stakeholder in and to the disputed funds, as Cimarex had executed a lease with another lessor who also claimed an interest in the disputed royalties. Further, the Court noted that concursus may be allowed "even if the stakeholder denies liability owed to one or all of the claimants."³⁸ This author notes, as the Court suggested under the facts and circumstances present in this case, that "[w]hile . . . concursus should [not] automatically be granted whenever it is invoked, courts

³⁴ See LA. CODE CIV. PROC. ANN. art. 4651. The provisions of a concursus are based upon the interpleader proceedings provided under the Federal Rules of Civil Procedure. *Id.* at cmt.

³⁵ Cimarex Energy Co. v. Mauboules, 09-1170 (La. 04/09/10); 40 So. 3d 931.

³⁶ *Id.* at 946.

³⁷ *Id.* at 941.

³⁸ *Id.* at 940.

should allow concursus liberally."³⁹ In addition, the court may award attorneys' fees to the successful concursus claimant.⁴⁰

<u>Texas</u>

The rules governing timely and proper royalty payment are found in Texas Natural Resources Code § 91.401, *et seq*.

The statute defines the terms "payor" and "payee" and uses these terms throughout to refer to the parties within the scope of the statute. Payor is defined as "the party who undertakes to distribute oil and gas proceeds to the payee, whether as the purchaser of the production of oil or gas generating such proceeds or as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due. The payor is the first purchaser of such production of oil or gas from an oil or gas well, unless the owner of the right to produce under an oil or gas lease or pooling order and the first purchaser have entered into arrangements providing that the proceeds derived from the sale of oil or gas are to be paid by the first purchaser to the owner of the right to produce who is thereby deemed to be the payor having the responsibility of paying those proceeds received from the first purchaser to the payee is defined as "any person or persons legally entitled to payment from the proceeds derived from the sale of oil or gas well located in this state."⁴²

The relevance of these definitions has been the subject of several reported decisions. In *Devon Energy Production Co. v. Apache Corp.*⁴³ the facts are as follows. Apache owned an oil and gas lease affecting a percentage of the mineral estate, and Devon owned a separate oil and gas lease affecting the remainder of the mineral estate. There was no operating agreement between the parties, and Apache drilled several wells in which Devon did not participate. Devon's lessors initiated the lawsuit against both Devon and Apache alleging that Devon did not pay them any royalties on production from Apache's wells. Devon argued that Apache was responsible for payment of its lessors' royalties under Texas Natural Resources Code § 91:402. Specifically, Devon argued that Apache was a "payor" under the statute because it operated the producing wells. The court disagreed, stating that to qualify as a "payor" under the statute,

³⁹ *Id.* at 946. *See also* PetroQuest Energy, LLC v. Banks, 16-516 (La. App. 3 Cir. 12/14/16); 208 So. 3d 543; Samson Contour Energy E & P, L.L.C. v. Smith, 49494 (La. App. 2 Cir. 12/29/14); 175 So. 3d 967.

⁴⁰ See LA. CODE CIV. PROC. ANN. art. 4659; Petro-Chem Operating Co. v. Flat River Farms, L.L.C., 51-212 (La. App. 2 Cir. 03/01/17); 2017 La. App. LEXIS 343.

⁴¹ TEX. NAT. RES. CODE ANN. § 91.401(2).

⁴² TEX. NAT. RES. CODE ANN. § 91.401(1).

⁴³ Devon Energy Prod. Co., L.P. v. Apache Corp., 550 S.W.3d 259 (Tex. App.—Eastland 2018, pet. denied).

a party must have undertaken, or set out to obligate itself, to the "payee" in some manner.⁴⁴ Apache did not undertake to enter into a legally binding relationship with Devon's lessors, so it is not considered a "payor" with respect to them.

The facts in *Prize Energy Resources, L.P. v. Cliff Hoskins, Inc.*⁴⁵ are complicated, but will be distilled here for purposes of illustrating its relevance with respect to the definition of "payor" and "payee" under the statute. BP owned a non-participating royalty interest ("NPRI") that was carved out of an unleased mineral interest. The mineral interest was committed to an operating agreement. Prize Energy was the operator of several wells on the BP tract. In this case, the court said that Prize Energy was a "payor" under the statute, and therefore owed royalties to BP. The court did not elaborate on its reasoning for its decision. It could be that it found persuasive the fact that the NPRI was carved out of an unleased mineral interest that was committed to an operating agreement to which Prize Energy was a party. It is also possible that the court's decision turned on the fact that the NPRI was carved out of an unleased mineral interest in the lands on which Prize Energy's wells were producing. Under the normal cotenancy rules, Prize Energy would be required to account to NPRI owners and unleased mineral owners.

Unlike Louisiana, Texas does provide a time period in which royalty payments must be made. In Texas, royalty payments must be made on or before 120 days after the end of the month of first sales of production from the well.⁴⁶ Thereafter, payments must be made according to the frequency and timing provided for in the oil and gas lease, or other agreement between the parties, provided that if the lease is silent and there is no other written agreement, payments on oil production must be made no later than 60 days after the end of the calendar month in which the oil is sold, and payments on gas production must be made no later than 90 days after the end of the calendar month in which the calendar month in which the gas is sold.⁴⁷

If a payment is made after the foregoing deadlines, interest will be owed in the amount of 2% above the percentage rate charged on loans to depository institutions by the New York Federal Reserve Bank, beginning at the expiration of the time period specified.⁴⁸ However, parties are free to include in their lease a different interest rate, and, if so, that is the rate that will be owed on any late payments.⁴⁹

⁴⁴ *Id.* at 263.

⁴⁵ Prize Energy Res., L.P. v. Cliff Hoskins, Inc., 345 S.W.3d 537 (Tex. App—San Antonio 2011, no pet.).

⁴⁶ TEX. NAT. RES. CODE ANN. § 91.402(a).

⁴⁷ Id.

⁴⁸ TEX. NAT. RES. CODE ANN. § 91.403(a).

⁴⁹ Id.

Notwithstanding the foregoing, a payor can suspend for longer than the time periods set forth above without owing any interest if one of the so-called "safe harbors"⁵⁰ apply. Payments can be suspended without interest in the following circumstances:

- There is a dispute concerning title that would affect distribution of payments;
- (2) There is a reasonable doubt that the payee:
 - (i) has sold or authorized the sale of its share of the oil or gas to the purchaser of such production; or
 - (ii) has clear title to the interest in the proceeds of production;
- (3) There is a requirement in a title opinion that places in issue the title, identity, or whereabouts of the payee and that has not been satisfied by the payee after a reasonable request for curative information has been made by the payor;
- (4) The payments are subject to a child support lien under Chapter 157, Family Code, or an order or writ of withholding issued under Chapter 158, Family Code; or
- (5) The payor has not received a signed division order from payee containing only the provisions listed in Section 91.402 (c)(1)(A)-(G), or a division order for oil payments in substantially the form and content as set forth in Section 94.402 (d).

Note that the safe harbor concerning a requirement in a title opinion (paragraph 3 above) also requires that the lessee make a reasonable request for curative information from the payor. It is not enough that there simply be an unsatisfied title requirement. The statute also requires the lessee to attempt to cure the title defect in order to receive the benefit of the safe harbor. Texas law does not require a lessee to obtain a title opinion prior to drilling an oil and gas well, and even if a lessee obtains a title opinion, there are changes in ownership that occur after a well is producing that can result in title defects and ambiguities. The safe harbors in paragraphs (1) and (2)(ii) appear to address this scenario.

⁵⁰ TEX. NAT. RES. CODE ANN. § 91.402(b)-(c).

If a payee does not receive a signed division order as described in the statute, it can suspend royalty payments without interest, as previously mentioned. Compare Louisiana law, discussed above, which explicitly states that a signed division order is not a prerequisite to the right to receive royalty payments.

Before a payee can file a lawsuit seeking relief for untimely payment of royalty, it must first give its payor written notice by mail of that failure.⁵¹ The payor then had thirty (30) days after receipt of the notice to either (1) pay the proceeds due, or (2) state in writing a reasonable cause for nonpayment. If a payee is successful in a suit to recover payments, it may be awarded a judgment with interest, reasonable attorney's fees, and a minimum award of at least \$200 in damages.⁵²

In addition, if there are multiple claims to the royalty in question, then the payor may choose to interplead the funds before the 30 day deadline. The Texas Rules of Civil Procedure allow for an interpleader action to protect a stakeholder from exposure to rival claims.⁵³ For instance, in *Bradshaw v. Sikes*, the Court affirmed that a lessee was allowed to interplead funds related to a dispute for nonpayment of royalties. The Court found that "the trial court had jurisdiction to consider [lessee's] request, as [lessee] had no ownership interest in those proceeds."⁵⁴ As the trial and appellate courts considered in *Bradshaw*, interpleader allowed the parties, as they litigated their various claims respecting their royalty interests, to be placed in their proper positions.

However, as the Texas Supreme Court noted in *Concord Oil Co. v. Pennzoil Exploration and Production Company*, "[t]here is no requirement that when a title dispute arises . . . that the payor must interplead or deposit the funds."⁵⁵ In addition, a court may deny the remedy if it finds that a lessee seeking to interplead funds is not an "innocent stakeholder." For instance, in *Union Gas Corp. v. Gisler*, where a lessee sought to interplead royalty funds, the Court of

⁵¹ Tex. Nat. Res. Code Ann. § 91.404.

⁵² Tex. Nat. Res. Code Ann. § 91.406.

⁵³ See TEX. R. CIV. P. 43; RSL-3B-IL, Ltd. v. Prudential Ins. Co. of Am., 470 S.W.3d 131, 139 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) ("An interpleader is a suit to determine a right to property held by a disinterested third party who is in reasonable doubt about ownership and who, therefore, deposits the property with the trial court to permit interested parties to litigate ownership, letting the court decide who is entitled to the funds and thereby avoiding the peril of deciding ownership itself.").

⁵⁴ Bradshaw v. Sikes, No. 02-11-00169-CV, 2013 Tex. App. LEXIS 2723, at *11-12 (Tex. App.—Fort Worth Mar. 14, 2013, pet. denied).

⁵⁵ Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451, 462 (Tex. 1998). *See also* Crawford v. XTO Energy, Inc., 509 S.W.3d 906, 909 (Tex. 2017) ("The record does not reflect whether XTO considered filing an interpleader action after receiving the title opinion to resolve any issues or potential disputes regarding entitlement to the Crawford-tract royalties."); Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co., 794 S.W.2d 442, 450 (Tex. App.— Corpus Christi 1990, writ denied) ("[Lessee] could have precluded any claim for interest by tendering the funds into the court's registry or placing them in an interest-bearing escrow account.").

Appeals considered, *inter alia*, that the lessee was "responsible for the conflicting claims to funds," and that it had waited over a year before seeking interpleader regarding the disputed royalties.⁵⁶ The lessee was not discharged from liability or judgment on the royalty owners' claims, and was not entitled to attorneys' fees for its attempted tender.⁵⁷ Accordingly, if a lessee chooses to invoke interpleader, it should carefully consider its position as a stakeholder in the matter, and "must in good conscience offer to do equity and to have the court accord to the defendant all of his rights."⁵⁸

In this author's experience, the most common reason for a lessee to suspend payment is because of some sort of title defect or ambiguity that raises a question about the proper parties and amounts to be received by them. There are several examples in Texas case law where courts have addressed common deed construction issues that often result in title problems.

In *Gore Oil v. Roosth*⁵⁹ the deed in question reserved an NPRI, and the issue was whether that NPRI was to be proportionately reduced to the undivided mineral interest owned by the grantor at the time. The court found that the deed was ambiguous, and a title defect clearly existed, so interest on the suspended royalties was not owed.

Returning to the case of *Concord Oil Co. v. Pennzoil Exploration and Production Co.*⁶⁰ the deed in question contained multiple granting clauses with different fractions and the issue was the quantum of interest conveyed. This type of deed is a recurring issue in Texas, and is the subject of numerous cases and scholarly papers.⁶¹ The court had no difficulty deciding that the ambiguity in the deed in question resulted in a dispute concerning title. The case is interesting for another point of law. The "typical" scenario in which the statute applies is between a working interest owner/well operator and a royalty owner. However, in *Concord*, the party claiming an interest from the well operator was another working interest owner. Thus, the issue arose whether a working interest owner is considered a "payee" under the statute that it

⁵⁶ Union Gas Corp. v. Gisler, 129 S.W.3d 145, 153 (Tex. App.—Corpus Christi 2003, no pet.).

⁵⁷ See, e.g., United States v. Ray Thomas Gravel Co., 380 S.W.2d 576, 581 (Tex. 1964) ("The Texas rule is that the innocent stakeholder in an interpleader is entitled to attorney's fees, to be paid out of the impleaded fund."); Bentley v. Grewing, 613 S.W.2d 49, 52 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) ("[Gatherer of production] [and an] innocent stakeholder should not be denied the recovery of attorney's fees incurred in its good faith assertion of its rights to the underlying attorney's fees.").

⁵⁸ Gisler, 129 S.W.3d at 153.

⁵⁹ Gore Oil Co. v. Roosth, 158 S.W.3d 596 (Tex. App.—Eastland 2005, no pet.)

⁶⁰ Concord Oil Co. v. Pennzoil Expl. & Prod. Co., 966 S.W.2d 451 (Tex. 1998).

⁶¹ See, e.g., Bruce M. Kramer, The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction, 24 Tex. Tech L. Rev. 1 (1993).

was designed to protect the interests of royalty owners," the statutory definition of "payee" was broad enough to include working interest owners as well.

The *Browning Oil Co., Inc. v. Luecke*⁶² case did not deal with a deed interpretation issue, but instead dealt with the amount of royalty owed to a lessor under a lease in which the lessee violated the pooling provision. The simplified facts are as follows. The operator attempted to pool the lessor's lands into a unit that clearly exceeded the authority granted in the lease's pooling clause. The operator nevertheless drilled a horizontal well that traversed the lessor's tract and other lands. The lessor sued, claiming a breach of the lease, and the court quickly handled that issue, agreeing with the lessor. Once it was decided that the unit was not valid, the next issue was the proper way to account to the lessor for its share of royalties. The lessor argued that because it was not possible to measure the amount of hydrocarbons being produced from its lands as compared to the other lands traversed by the horizontal wellbore, it was owed its full royalty share. In other words, it claimed that it was entitled to a royalty share in all production from the wellbore, not just the portion of that production that came from underneath its lands. The court rejected this argument, instead holding that the lessor was entitled only to that portion of "production [that] can be attributed to [its] tracts with reasonable probability."⁶³

The above quoted holding is often cited as a justification for the validity of allocation wells. There is no formal definition of an allocation well, but it is basically a horizontal well that is drilled on more than one tract or unit, without pooling the tracts together. Although *Browning* is known primarily for this point of law, the court also addressed the issue of whether the operator was justified in suspending royalties pending the outcome of the litigation. The court's analysis on this issue is as follows:

The statute provides that payment of proceeds may be withheld without interest when there is: "a reasonable doubt that the payee: . . . (B) has clear title to the interest in the proceeds of production." Because this dispute concerns the Lueckes' royalty share in production, Browning argues that this exception should apply here. We disagree. . . . The crux of this case is whether the Lueckes are entitled to a pro rata share of royalties under the pooling provisions or royalties for all production from their land. Their *entitlement* to royalties, however, was never in dispute. All parties agreed that the Lueckes' royalty interests are valid. Thus,

 ⁶² Browning Oil Co. v. Luecke, 38 S.W.3d 625 (Tex. App.—Austin 2000, pet. denied).
 ⁶³ Id. at 647.

the Natural Resources Code does not excuse Lessees from paying prejudgment interest where there is no legitimate title dispute, but rather a dispute as to how to calculate the Lueckes' royalties.⁶⁴

The court did not mention another safe harbor that could have applied, namely the one that allows a payor to suspend if there is a dispute concerning title that would affect distribution of payments.⁶⁵ The reason for this omission is unclear. The court also did not mention whether the operator paid the undisputed portion of royalties to Leucke, or whether it suspended the entire amount. Texas law provides that in a situation where a royalty owner is owed some amount, but that amount is in dispute, the parties should stipulate as to the minimum amount owed, and that amount should be paid.⁶⁶

The *ConocoPhillips v. Koopman*⁶⁷ case dealt with the question of whether the statute or the oil and gas lease controls when they are in conflict. The payor in the case, Burlington Resources (ConocoPhillips' predecessor in interest), withheld royalty payments because of a question about the validity of an NPRI which affected the amount of royalties owed to its lessor. Koopman claimed the royalty interest, but Burlington withheld payment because of the possibility that the deed creating the NPRI violated the rule against perpetuities. The court held that the NPRI was valid, and, therefore, Koopman was entitled to payment.

Although the statute would allow Burlington to suspend the royalty payment under the safe harbor rules, the oil and gas lease between Koopman and Burlington required that royalty payments be made within certain time periods, and required interest on late payments. Burlington agreed that it breached the lease provision, but argued that the statute and its safe harbor rules modify the parties' contractual rights and prevents Koopman from recovering under the lease provision. The court stated that "[a]brogating common law claims is disfavored, and requires a clear repugnance between the common law and statutory causes of action."⁶⁸ After going through an extensive analysis, the court held that the statute did not preclude the Koopman's claim for damages based on the contractual provision in the lease.

In an apparent attempt to change the law with this aspect of the *Koopman* case, the legislature amended Texas Natural Resources Code § 91.402 by adding the following language:

⁶⁴ *Id.* at 647-48.

⁶⁵ Id.

⁶⁶ Headington Oil Co., L.P. v. White, 287 S.W.3d 204 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

⁶⁷ ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858 (Tex. 2018).

⁶⁸ Id. at 877 (quoting Cash Am. Int'l, Inc. v. Bennett, 35 S.W.3d 12, 16 (Tex. 2000)).

A payee does not have a common law cause of action for breach of contract against a payor for withholding payments under Subsection (b) unless, for a dispute concerning the title, the contract requiring payment specifies otherwise.⁶⁹

It appears that the intent of this addition was to require parties to be explicit about their intention to preserve common law claims for nonpayment of royalties in their oil and gas leases. In other words, it appears that the statute will control over contractual provisions that conflict with the statute, except if the parties specify otherwise in their contracts.

Overpayment of Royalties

<u>Louisiana</u>

The Mineral Code does not speak directly to whether a lessee who overpays a royalty owner may be entitled to recovery. Generally, the Louisiana Civil Code provides relief that "[a] person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it."⁷⁰ Further, the Louisiana Civil Code states that when something is received that is not owed, "the person who received it is bound to restore the thing itself, if it exists."⁷¹

In relation to these provisions, Louisiana courts have reviewed whether a lessee has a right to recovery for overpayment. For instance, in *Whitehall Oil Co. v. Boagni*,⁷² the Louisiana Supreme Court affirmed that an oil company, which sought refunds for overpayment of gas royalties, was entitled to reimbursement. The Court considered that the lessee was required to provide payments by a third party, the Federal Power Commission, and under principles of equity, the lessors would be unjustly enriched if allowed to retain the overpayments.

In *Matthews v. Sun Exploration & Production Co.*, the Louisiana Court of Appeals also held that a lessee was entitled to recover for overpayment of royalties—under principles of unjust enrichment and in accordance with the Louisiana Civil Code—and against a claim for overpayment.⁷³ In *Matthews*, the lessee, Sun, confronted with a series of unrecorded conveyances of interests within a family that disguised proper ownership, was sued by a lessor who alleged that he was improperly receiving lesser amounts for royalties owed between his

⁶⁹ TEX. NAT. RES. CODE ANN. § 91.402(b-1).

⁷⁰ LA. CIV. CODE ART. 2299.

⁷¹ LA. CIV. CODE ART. 2304.

⁷² Whitehall Oil Co. v. Boagni, 253 La. 731, 219 So. 2d 512 (1969).

⁷³ Matthews v. Sun Expl. & Prod. Co., 521 So.2d 1192 (La. Ct. App. 2d Cir.1988).

kin. In denying the lessor's claim, Court considered, *inter alia*, that the lessee acted reasonably in response to the error, that the lessor had or should have had knowledge when it signed a division order of the discrepancy causing overpayment, and, further, that liberative prescription applied to the lessor's claims.⁷⁴ Further, the Court ordered repayment to Sun by the overpaid lessor, the Court finding that any "error in overpaying . . . amounted to an ordinary or 'honest' mistake as contemplated by the Civil Code Articles," and that the lessee could recover under its theory of "unjust enrichment."⁷⁵

<u>Texas</u>

The cause of action in Texas for recovery of overpaid royalties is called "money had and received." The claim is equitable in nature, and "less restricted and fettered by technical rules and formalities than any other form of action."⁷⁶ Basically, the only things a payor needs to show to recover under this theory is that the payee "holds money which in equity and good conscience belongs to him."⁷⁷

However, there are defenses to such a claim. Basically, whether a payor can recover overpaid royalties depends on the facts and circumstances surrounding the reason for the overpayment. If the overpayment was made because of a mistake of fact, such as typographical error, calculation error, or another "negligent" reason, then the payment will generally be recoverable. However, if the overpayment is based on a mistake of law, then the overpayment may not be recoverable.

In Atlantic Refining Co. v. Tidwell⁷⁸ a royalty owner was paid royalties that belonged to a different royalty owner because of an error resulting from the transposition of two numbers on a computer punch card. The royalty owner argued that the operator should not be allowed to recover the royalty payments because such payments were made voluntarily.⁷⁹ The operator argued that the payment was made because of a mistake by an individual in its accounting department, who inadvertently transposed two numbers in an owner number code, which allotted a third party's payments to the royalty owner. In its analysis, the court found it important that the employee in the accounting department "was ignorant and unconscious of the mistake or error consisting of the transposition of said figures …"⁸⁰ Because the employee

⁷⁴ *Id.* at 1198.

⁷⁵ *Id.* at 1199.

⁷⁶ Staats v. Miller, 150 Tex. 581 (Tex. 1951).

⁷⁷ *Id.* at 584.

⁷⁸ Atl. Ref. Co. v. Tidwell, 318 S.W.2d 905 (Tex. Civ. App.—Houston 1958).

⁷⁹ The "voluntary payment rule" is a common law doctrine stating that someone who makes a payment voluntarily cannot recover it on the ground that he or she was under no legal obligation to make the payment. *See, e.g.,* BMG Direct Mktg. v. Peake, 178 S.W.3d 763, 768-71 (Tex. 2005).

⁸⁰ *Id.* at 907.

who made the mistake did so without consciously knowing it, and was not aware of the mistake, the court allowed the operator to recover the overpaid royalties. Other Texas courts have allowed actions for "money had and received" and "which in equity and good conscience" belongs to the payor, but have considered that the statute of limitations may also affect recovery.⁸¹

In contrast, in *Castle Tex. Oil & Gas Ltd. P'ship v. Dominion Okla. Tex. Expl. & Prod.*, the Texas Court of Appeals held that a party was not required to refund overpayment regarding an incorrect royalty payment, when the calculation was derived from a mistake of law.⁸². The Court considered that recoupment, under Texas law, may be applicable under a mistake of fact, but that "Dominion changed the calculation of royalties based upon legal documents, not because of some factual mistake."⁸³ Because Dominion's payments were based upon considerations of law, "Dominion either had or was charged with knowledge of the relevant documents defining the royalties and overrides."⁸⁴ While the Supreme Court vacated the Appeals Court judgment pursuant to a settlement agreement, the Supreme Court overruled the parties' request that the Appeals Court opinion be vacated.⁸⁵ Accordingly, this author suggests that the case is a probable example of how a Texas court may rule on this issue.

Likewise, in *XTO Energy, Inc. v. Goodwin*, the Texas Court of Appeals, also considered a party's claim for reimbursement when it voluntarily paid royalties in error to a lessee under a mistake of law.⁸⁶ The Court, in denying reimbursement, considered that the operator, XTO, "had all the documents and information before it to assess and evaluate [payment]" and that "Goodwin had no part in creating the errors resulting in XTO's alleged overpayment of royalties to him."⁸⁷

⁸¹ Amoco Prod. Co. v. Smith, 946 S.W.2d 162, 164 (Tex. App.—El Paso 1997, no writ).

⁸² No. 13-04-307-CV, 2005 Tex. App. LEXIS 6037, (Tex. App.—Corpus Christi July 28, 2005).

⁸³ *Id.* at *10.

⁸⁴ Id. at *11.

⁸⁵ Dominion Okla. Tex. Expl. & Prod. v. Castle Tex. Oil & Gas, No. 05-0739, 2007 Tex. LEXIS 209, (Mar. 2, 2007).

⁸⁶ XTO Energy, Inc. v. Goodwin, 584 S.W.3d 481, 499 (Tex. App.—Tyler 2017, pet. denied).

⁸⁷ *Id.* at 499. The Court also noted the Gavenda case in making its decision, stating that "[w]hen an operator prepares erroneous orders and retains the benefits, division orders are not binding because the operator has profited from its own errors, thus negating unjust enrichment." *Id.*

"PRICES GO UP, PRICES GO DOWN":

THE EFFECT OF VOLATILE MARKET CONDITIONS ON A PRODUCTION IN "PAYING QUANTITIES" ANALYSIS

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§ 1.01 Introduction*

What a difference a couple of years can make. Let's start with calendar year 2020.

One would not wish to be the historian tasked with chronicling the calendar year 2020. As much time would be devoted to "where to begin," as to cataloguing the extraordinary events or occurrences that all are quite thrilled to have in the rear-view mirror. From unprecedented wildfires in the West, hurricanes in the Atlantic and Gulf of Mexico, the impeachment of a President (the first of two), resulting political strife and discord, racial and social justice movements, a Presidential election like no other, and Senate races with control of that Chamber in the balance, etc., it was quite the year.

And let us not forget a pandemic called Covid-19, and the essential shut-down of the national economy, and the introduction of an entirely new vocabulary and imposition of social conventions (social distancing, Zoom calls, business closings, home schooling, comorbidity, Operation Warp Speed, PPE, Hydroxychloroquine, herd immunity, face masking, etc.)?

With that as a background, who could disagree that calendar year 2020 was by any measure a challenging year in the upstream sector of the oil and gas industry, perhaps like none other in recent memory? Despite its unprecedented significance, a particular event that might even have been overlooked by many is the historic collapse of futures prices of oil that occurred on April 20, 2020.

Due principally to an oversupply of oil and concomitant lack of storage or out-take capacity¹ resulting from the coronavirus-induced slump in demand, as well as significant overproduction by Russia and Saudi Arabia, who engaged in a crude oil price war,² the price of a futures contract for May 2020 deliveries of crude oil plummeted to as low as -\$40 a barrel. The principal consequence of that remarkable event meant that producers would have to pay others to take the oil off of their hands.³

And then came the events of early 2022. At about the same time that mask mandates were being lifted as the effects of the pandemic were seeming to wane, and the American economy was poised to reopen, Russia invaded its neighbor Ukraine on February 24, 2022, which led

^{*} This paper is a revision of a presentation entitled *Production in 'Paying Quantities' in These Challenging Days: How Much Financial Stress Can Your Lease Withstand?*, originally published by the Rocky Mountain Mineral Law Foundation in the Proceedings of the 67th Rocky Mountain Mineral Law Institute 6-1 (2021).

¹ David Wethe, Alex Nussbaum & Ryan Collins, *Oil Boom Bottleneck Costs Permian Investors \$1 Billion a Day*, <u>Bloomberg</u> (June 7, 2018).

² Clifford Krauss & Stanley Reed, *Oil Prices Dive as Saudi Arabia Takes Aim at Russian Production*, <u>N.Y.</u> <u>Times</u> (Mar. 8, 2020).

³ Sheela Tobben, Oil for Less Than Nothing? Here's How That Happened, Bloomberg (Apr. 20, 2020).

to the imposition of significant sanctions on Russia's energy industry, resulting in a significant increase in the per barrel price of oil worldwide.⁴

Led by the policies of the Biden administration that were anything but fossil fuelfriendly, and certainly as a consequence of the decision (announced on March 8, 2022) to cease oil imports from Russia, oil prices increased dramatically. These increases were a result of a combination of factors, including diminishing supplies with no significant increase in drilling due in large part to Presidential executive orders revoking the permit for the Keystone XL Pipeline,⁵ "pausing" Federal lease sales,⁶ eliminating subsidies for fossil fuels, and banning hydraulic frac'ing on Federal lands,⁷ and nominating as a Chair of the Office of Comptroller of Currency an individual who is openly hostile to oil and gas companies, leading to fears of an inability on extending credit to the fossil fuel industry.⁸

Certainly, "prices go up, prices go down," and the uncertainty associated with such volatility can bring great pressure on issues of lease maintenance.

These extraordinary events make an examination of the state of the law pertaining to lease maintenance both timely and appropriate, particularly as the doctrine of production in "paying quantities" is affected by low commodity prices.

Although excellent articles have been authored on the topic of "paying quantities" production for purposes of the habendum clause of a mineral lease,⁹ another look is always appro-

⁵ Executive Order 13990 of January 20, 2021, available for viewing or download at https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis.

⁶ See Louisiana v. Biden, 2021 WL 2446010 (W.D. La. June 15, 2021).

⁷ Executive Order 14008 of January 27, 2021, available for viewing or download at https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad.

⁸ U.S. Chamber Issues Rare Warning on Fed Nominee Raskin, Citing Oil, Gas Views, <u>Reuters</u> (Jan. 28, 2022).

⁹ See, e.g., Edwin M. Cage, Production in Paying Quantities: Technical Problems Involved, 10 INST. ON OIL & GAS L. & TAX'N 61 (1959); Leonard K. Wells, Production in Paying Quantities—A New Look at an Old Subject, 13 ANN. INST. ON MIN. LAW 88 (1966); Bruce M. Kramer, Keeping Leases Alive in the Era of Horizontal Drilling and Hydraulic Fracturing: Are the Old Workhorses (Shut-In, Continuous Operations, and Pooling Provisions) Up to the Task?, 49 WASHBURN L.J. 283 (2010); Alex Ritchie, A Reexamination and Reformulation of the Habendum Clause Paying Quantities Standard Under Oil and Gas Leases, 3 OIL & GAS, NAT. RESOURCES & ENERGY J. 977 (2017).

⁴ According to data posted at https://www.eia.gov/dnav/pet/pet_pri_spt_s1_d.htm (visited March 9, 2022), the per barrel spot price for WTI crude oil at Cushing Oklahoma, was \$96.13 on February 28, 2022, and rose to \$119.26 on March 7, 2022, a 24% increase in one week. It is inconceivable, at this writing, that the price will not continue to rise, with one published article stating that *Oil Could Hit \$200 a Barrel, says Rystad Energy*, <u>Reuters</u> (Mar. 8, 2022), while Russia warns of \$300 per barrel oil. *Russia Warns West of \$300 per Barrel Oil, Cuts to EU Gas Supply*, <u>Reuters</u> (Mar. 7, 2022).

priate and timely,¹⁰ especially after the momentous market disruptions of 2020,¹¹ and the reversal of distressed commodity pricings due to the events of early 2022.

§ 1.02 Components Pertinent to Analysis of Production in "Paying Quantities"

[1] Genesis of the Rule

The requirement that production must be in "paying quantities" in order to maintain a mineral lease in force and effect, pertains even if the mineral lease is silent on the subject.¹² In *Caldwell v. Alton Oil Co.*, the Louisiana Supreme Court noted that the lease did not contain the "usual and customary stipulation" that production must be in "paying quantities."¹³ Based on that omission, the lessee contended that "the quantity of oil produced has nothing to do with the continued life of the lease; that just so long as any oil at all is produced from the well the lease cannot be declared forfeited."¹⁴ Noting that it was "not prepared to give our approval to such a proposition,"¹⁵ the court stated, as follows:

To hold that any production, however small, and in less than paying quantities, gives to the lessee the right to continue the lease indefinitely and with no obligation to further development, would be contrary to the established rule of jurisprudence, and would be writing for the parties a contract which they never intended to make.¹⁶

¹¹ This paper does not address the topic of flat rate royalty or rental leases as to which the doctrine of production in "paying quantities" does not apply. *See Bruen v. Columbia Gas Transmission Corp.*, 426 S.E.2d 522, 527 (W.Va. 1992) ("Therefore, in a case involving termination of such an oil and gas lease which provides 'flat-rate' rental payments, it is reversible error for a circuit court to instruct the jury that the word 'produced' in the lease means 'produced in paying quantities.").

¹² See, e.g., Brown v. Sugar Creek Syndicate, 197 So. 583, 593 (La. 1940) (interpreting the customary habendum clause providing that the lease is to last "for a period of five years and as long thereafter as oil or gas, or either of them, is produced" to mean "producing oil and gas in 'paying quantities."), and *Fleck v. Mo. River Royalty Corp.*, 872 N.W.2d 329, 333 (N.D. 2015) ("The term 'production' used in the habendum clause in this case means 'production in paying quantities.").

¹³ 108 So. 314, 315 (La. 1926).

¹⁴ Id.

¹⁵ Id.

¹⁶ *Id.*; *see also Peacock v. Schroeder*, 846 S.W.2d 905, 909 (Tex. App.—San Antonio 1993, *no writ*) (The phrase was stricken, but the court stated that it would "attach no significance to the striking of 'whether or not in paying quantities.' The lease requires production in paying quantities.").

¹⁰ Portions of this paper represent an adaptation of a treatise and articles that this presenter has authored, specifically, Patrick S. Ottinger, *Louisiana Mineral Leases: A Treatise* (2016) (hereinafter "OTTINGER, MINERAL LEASE TREATISE"); Patrick S. Ottinger, *Production in 'Paying Quantities'—A Fresh Look*, 65 LA. L. REV. 635 (Winter 2005); and Patrick S. Ottinger, *Calculating the Lessor's Royalty Payment: Much More Than Mere Math*, 6 LSU J. OF ENERGY L. & RES. 1 (2017).

One might encounter a reference to production in "*commercial* quantities." This term has been deemed synonymous with the more familiar "*paying* quantities,"¹⁷ but has also been distinguished by courts in particular contexts.¹⁸

In most oil and gas producing states, the requirement, for purposes of the habendum clause of a mineral lease, that production must be in "paying quantities" is grounded in jurisprudence, rather than being statutorily based. An exception is Louisiana, a civil law jurisdiction,¹⁹ where the relevant articles of the Louisiana Mineral Code²⁰ are greatly influenced by, and essentially represent a codification of, the tenets announced in the 1959 Texas Supreme Court decision in *Clifton v. Koontz.*²¹

While the 1942 case of *Garcia v. King*²² was a significant precursor to *Clifton*, the 1959 decision of the Texas Supreme Court added a bit more context and clarity to the principles announced in the former case.

A majority of oil and gas producing states embrace the principles recognized in the landmark case of *Clifton*.²³ One notable exception is Ohio, which generally abides by the principles

¹⁸ See, e.g., State v. Wallace, 369 N.E.2d 781, 785 (Ohio Ct. App. 1976) ("Nor is the phrase 'commercial quantities' equivalent to the phrase 'paying quantities' often found in oil and gas leases, and in the statutes and regulations pertaining to oil and gas wells. 'Paying quantities' connotes a profit; 'commercial quantities' does not.").

¹⁹ For an excellent discussion and analysis of the origins of Louisiana law (in contrast to the law of Texas), see Patrick H. Martin & J. Lanier Yeates, *Louisiana and Texas Oil & Gas Law: An Overview of the Differences*, 52 LA. L. REV. 769 (March 1992).

²⁰ Act No. 50, 1974 La. Acts Vol. III (codified as amended at LA. REV. STAT. ANN. §§ 31:1-:217), effective January 1, 1975. See § 1.02[2][f], infra.

²¹ 325 S.W.2d 684 (Tex. 1959).

²² 164 S.W.2d 509 (Tex. 1942).

²³ <u>Arkansas</u>: Inman v. Milwhite Co., 292 F.Supp. 789 (E.D. Ark. 1967), aff'd, 402 F.2d 122 (8th Cir. 1968) (applying Arkansas law); <u>California</u>: Lough v. Coal Oil, Inc., 266 Cal. Rptr. 611 (Ct. App. 1990); <u>Kansas</u>: Reese Enters., Inc. v. Lawson, 553 P.2d 885 (Kan. 1976); <u>Louisiana</u>: Lege v. Lea Expl., Inc., 631 So.2d 716 (La. Ct. App. 3d), writ den'd 635 So.2d 1112 (La. 1994); <u>Michigan</u>: Michigan Wisconsin Pipeline Co. v. Michigan Nat'l Bank, 324 N.W.2d 541 (Mich. Ct. App. 1982); <u>Nebraska</u>: Superior Oil Co. v. Devon Corp., 458 F.Supp. 1063 (D. Neb. 1978), rev'd, 604 F.2d 1063 (8th Cir. 1979) (applying Nebraska law); <u>New Mexico</u>: Maralex Res., Inc. v. Gilbreath, 76 P.3d 626 (N.M. 2003); <u>North Dakota</u>: Fleck v. Mo. River Royalty Corp., 2015 ND 287, 872 N.W.2d 329; <u>Oklahoma</u>: Hininger v. Kaiser, 738 P.2d 137 (Okla. 1987); <u>Pennsylvania</u>: Babb v. Clemensen, 687 A.2d 1120 (Pa. Super. Ct. 1996); <u>West Virginia</u>: Imperial Colliery Co. v. Oxy USA Inc., 912 F.2d 696 (4th Cir. 1990) (applying West Virginia law); <u>Wyoming</u>: Champlin Petroleum Co. v. Mingo Oil Producers, 628 F.Supp. 557 (D. Wyo. 1986), aff'd without op., 841 F.2d 1131 (10th Cir. 1987) (applying Wyoming law).

¹⁷ See, e.g., Texaco, Inc. v. Fox, 618 P.2d 844, 847 (Kan. 1980) ("[W]e must determine whether the term 'commercial quantity' is synonymous with the term 'paying quantity.' . . . We hold the terms are synonymous."); see also Ross Explorations, Inc. v. Freedom Energy, Inc., 8 S.W.3d 511, 512–13 (Ark. 2000) ("each lease required that the lessee produce gas in 'commercial paying quantities' in order to preserve lease rights beyond the term of years stated in the lease").

of the necessity to show a profit, but pays greater deference to the judgment of the lessee in reference to the continuation of the lease.²⁴

Elements of the "Paying Quantities" Analysis [2]

An analysis of whether a mineral lease is producing in "paying quantities" entails a comparison of a certain class of expenses, typically called "current operating expenses"²⁵ or "lifting costs,"²⁶ to a certain stream of revenue. If, in a proper comparison, the value of this revenue exceeds the pertinent expenses, even by a little, the inquiry ends, and the mineral lease is maintained.

But importantly, if relevant expenses exceed relevant revenue, the court will endeavor to discern the motive of the operator in continuing production under the mineral lease by the amount of production being obtained in reference to the cost necessary to bring the production to the surface. In particular, if the revenue generated to the lessee's interest is minimal, or even barely covers the costs of operations, the court will assess whether the principal motivation for the operator's continuation of production is for speculative purposes.

The policy inherent in the formulation articulated by *Clifton* is to encourage production (which is in the public interest) while also affording the lessee the opportunity to recover as much of its investment as possible, even though the well may never achieve full "payout."²⁷

Given the essential policy underlying the rule—a disapproval of a lessee operating in a speculative or selfish manner,²⁸ without regard to the rights of the lessor whose land or minerals would be held hostage—it is unlikely that a court would allow, as stated by the Louisiana Supreme Court more than a century ago, mere "dribblings" of oil or gas to suffice to maintain a lease.²⁹

²⁵ See Gloria's Ranch v. Tauren Expl., Inc., 223 So.3d 1202, 1213 (La. Ct. App. 2d 2017) ("In order to have production in paying quantities, the lease must produce in quantities sufficient to meet current operating expenses and yield a small profit "(emphasis added)), aff'd in part, rev'd in part, 252 So.3d 431 (La. 2018). In the interest of full disclosure, the author represented the American Bankers Association and the Texas Bankers Association as amici curiae in support of Wells Fargo's writ application to the Louisiana Supreme Court, and on the merits.

²⁶ Stewart v. Amerada Hess Corp., 604 P.2d 854, 857 (Okla. 1979).

²⁷ While often a matter of contractual definition, as a general proposition, "payout" is the point in time at which the owners of the working interest in and to a well have recovered out of production attributable to their interests, the entirety of the costs and expenses incurred in the drilling, testing, completing, equipping and operating the well.

²⁸ See § 1.02[2][f], infra.

²⁹ Anse LaButte (Le Danois) Oil & Minerals Co. v. Babb, 47 So. 754, 757 (La. 1908). Resisting the notion that the quantity of oil produced should be of no pertinence to lease maintenance, one dissenting justice posited that "[i]t is not sound doctrine that an oil lease may be extended beyond its term by the production of a *mere smell of* oil." S. Penn Oil Co. v. Snodgrass, 76 S.E. 961, 968 (W.Va. 1912) (Robinson, J., dissenting) (emphasis added).

²⁴ See § 1.03[2], infra.

As in most cases, the "devil is in the details." Thus, it is essential to understand that amount of revenue to be considered in this analysis, and to discern the aggregated class of expenses against which such revenue is to be measured.³⁰



Figure 1

[a] Revenue to Be Considered

The revenue that is taken into consideration in this analysis is the net revenue interest of the lessee at inception of the lease relationship; it is ascertainable on the face of the mineral lease. That is, of course, determined by subtracting only the royalty specified in the lease for the benefit of the lessor. Hence, if the mineral lease provides for a one-fifth royalty, the lessee's "net revenue interest" is four-fifths, assuming, of course, that the lease covers the entire interest in the minerals in the leased premises.³¹

³⁰ See Figure 1. A large, full-color version of this figure may be found and downloaded at https://www.ottingerhebert.com/wp-content/uploads/Two-Baskets.pdf.

³¹ See OTTINGER, MINERAL LEASE TREATISE, *supra* note 10, at § 11-03 ("Upon the granting by a lessor of a mineral lease, in which the lessor reserves a royalty, the lessee's obligations for costs and rights to revenue are immediately represented or embodied, graphically, in 'two columns' or 'two pies,' *viz.*, the WI—which is the responsibility for costs—and the NRI—which, as the name suggests, represents 'revenue interest,' but which is 'net' of the lessor's royalty." (footnotes omitted)).

[b] Expenses to Be Disregarded

[i] Capital Costs

First, it is necessary to identify that category of costs that are not to be considered in the analysis as to whether a mineral lease is producing in "paying quantities." Costs incurred in seeking to *find* or *establish* production are not operating costs and hence are not relevant.³² In accounting jargon, these are sometimes called "sunk costs," which need not be recouped out of production for purposes of the lease's habendum clause.

Following the same logic, expenses associated with "reworking operations"³³ are not to be considered as lifting expenses. In *Pshigoda v. Texaco, Inc.*, the Texas Court of Appeals stated that "[a] reworking expenditure is analogous, and closely related, to the initial drilling expenses. It is usually a one time, single expense item, that . . . is treated as a capital investment."³⁴

[ii] "Other Burdens" on the Lessee's Interest

For purposes of calculating the relevant revenue stream, it is of no moment that the "net" net revenue interest in production actually inuring to the lessee is an amount less than the amount determined by this basic formula. Hence, the analysis is unconcerned with how the lessee distributed the net revenue interest attributable to the full working interest.

As stated in *Clifton*, "[t]he entire income attributable to the contractual working interest created by the original lease is to be considered."³⁵

The Louisiana Mineral Code excludes the relevance of post-grant burdens on the working interest by alluding to "production allocable to the *total original right of the lessee* to share in production under the lease" as being the relevant stream of revenue involved in the analysis.³⁶

³² See Denker v. Mid-Continent Petroleum Corp., 56 F.2d 725, 727 (10th Cir. 1932) (applying Oklahoma law) ("When an oil and gas lease is for a specified term and as long thereafter as oil and gas is produced therefrom in 'paying quantities,' oil is produced in paying quantities within the meaning of the lease as long as the returns from a well drilled in accordance with the lease exceed the cost of operation after completion, although the well may never repay the drilling costs, and the operation as a whole may result in a loss.").

³³ A "reworking operation" is "[w]ork performed on a well after its completion, in an effort to secure production where there has been none, restore production that has ceased or increase production." Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS: MANUAL OF OIL AND GAS TERMS (2020).

³⁴ 703 S.W.2d 416, 418–19 (Tex. App.—Amarillo 1986, *writ ref'd n.r.e.*).

 $^{^{35}}$ 325 S.W.2d at 693; *see also Transport Oil Co. v. Exeter Oil Co.*, 191 P.2d 129, 133 (Cal. Dist. Ct. App. 1948) ("It would seem clear, then, that the operation was to be considered profitable and the lease still operative as long as oil and gas could be produced in paying quantities by a lessee who was required to pay only the basic royalty of $16\frac{2}{3}$ per cent as an expense of operation."); *Reese Enters., Inc. v. Lawson*, 553 P.2d 885, 898 (Kan. 1976) ("Thus, the share of production attributable to an outstanding overriding royalty interest will not be excluded but will be taken into account in determining income.").

³⁶ LA. REV. STAT. ANN. § 31:124 (emphasis added.); *see* OTTINGER, MINERAL LEASE TREATISE, *supra* note 10, at § 3-15.

Thus, overriding royalty interests, production payments, or other burdens created by the lessee would not be taken into consideration to the extent that the net revenue interest allocable to the working interest would be diminished thereby. Rather, the comparison to lifting costs is made to the full stream of revenue allocable to the working interest, without regard to the various revenue burdens on that working interest.³⁷

[c] Expenses to Be Considered

As to what constitutes a "current operating expense," those expenditures incurred as a direct result of the leasehold operations would be considered, "the relevant concept being that the basic limitation on any expense to be considered is that it must be traceable to the actual expense of production of the well's product, once the capability of the well to produce is assured."³⁸

The relevant costs are often called "lifting costs," defined by the Oklahoma Supreme Court as "[e]xpenses necessary to lift the oil from the ground."³⁹ This moniker is certainly consistent with the notion that "sunk costs"⁴⁰—which are capital in nature—are not to be taken into consideration. However, as will be noted, the term "lifting costs" is a bit archaic and is not in all instances precisely accurate or descriptive.

Cogent elucidation on the costs pertinent or not to a "paying quantities" analysis was provided by a Louisiana court in *Lege v. Lea Exploration, Inc.*⁴¹

In that case, the lessors sued the lessees to declare a mineral lease terminated because of a failure to produce in "paying quantities." The lessors contended that certain identified costs and expenses were lifting expenses. The issue was stated by the court, as follows:

The heart of the dispute calls into question the legal classification of certain expenditures by the lessee. Allocation of these expenditures to the category of "operating expenses," which are deductible from a producing properties [sic] gross revenues, could result in our finding that the well did not consistently "produce in paying quantities" and a forfeiture of the lease at some point during the

³⁷ See Hininger v. Kaiser, 738 P.2d 137, 140 (Okla. 1987) ("Overriding royalties are not charged with the cost of development or production. Overriding royalties are not royalties payable to the lessor..., therefore, they cannot be charged as lifting costs against the working interest owners.... Overriding royalties, like costs of drilling, are part of the capital investment instead of part of the lifting costs." (footnotes omitted)). In similar manner, a production payment should not be taken into consideration. See Vance v. Hurley, 41 So.2d 724, 727 (La. 1949).

³⁸ Thomas P. Battle, *Lease Maintenance in the Face of Curtailed/Depressed Markets*, 32 ROCKY MT. MIN. L. INST. 14-1, § 14.05[1][c] (1986).

³⁹ Stewart v. Amerada Hess Corp., 604 P.2d 854, 857 n. 8 (Okla. 1979).

⁴⁰ "In economics and business decision-making, a 'sunk cost' is a cost that has already been incurred and cannot be recovered." N. Gregory Mankiw, PRINCIPLES OF MICROECONOMICS (5th ed. 2009); *see also Pshigoda v. Texaco, Inc.*, 703 S.W.2d 416 (Tex. App.—Amarillo 1986, *writ ref'd n.r.e.*).

⁴¹ 631 So.2d 716 (La. Ct. App. 3d), *writ den'd* 635 So.2d 1112 (La. 1994). In the interest of full disclosure, the author represented the operator in this case.

years 1981 through 1984; their classification as "repair and remedial" or "equipment" capital costs, on the other hand, would lead us to affirm the lower court's conclusion that the well never ceased to "produce in paying quantities."⁴²

The principal disputed item of expenditure was the cost incurred by the lessee in converting an existing borehole to a saltwater disposal system. For a period of time, the lessees disposed of the saltwater by trucking it off of the leased premises, the cost of which would be treated as operating costs and, accordingly, relevant to the analysis. The lessors argued that, by analogy, "so should be the expenditures which replace them."⁴³

The court stated that it was "unable to accept the premise of plaintiff's position, that the nature of a lessee's cost is determined strictly by the substitution accomplished."⁴⁴ Rather, the classification of a given item of expense as being "ordinary and recurring or extraordinary and largely non-recurring in nature" was determinative as to whether that expense item should be considered as a lifting expense.⁴⁵ Since the disputed costs were treated as "extraordinary and largely non-recurring in nature," the costs of conversion were disregarded, and the mineral lease was maintained.⁴⁶

The decision in this case puts a fine—and critical--point of demarcation on the proper categorization or classification of costs that are applicable to a "paying quantities" analysis. It creates a bright line for an accountant to then categorize or classify a particular item of expense as being either capital in nature (including "repair and remedial" or "equipment"), non-recurring or extraordinary (and, hence, irrelevant to the inquiry), or operating, recurring, and ordinary in character (thus, relevant to the analysis).⁴⁷

Many cases have evaluated discrete costs for the purpose of discerning if the cost is of a category or classification that justifies its relevance to a "paying quantities" analysis. As the engineering or mechanical function to which the cost relates is uniform throughout the country, cases from the several producing states are often noted in courts engaged in the analysis.

 42 *Id.* at 717.

⁴³ *Id.* at 718.

⁴⁴ *Id.* at 719.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ This case has been cited by other courts in and outside Louisiana. See, e.g., Edmundson Bros. P'ship v. Montex Drilling Co., 731 So.2d 1049 (La. Ct. App. 3d 1999); O'Neal v. JLH Enters., Inc., 862 So.2d 1021 (La. Ct. App. 2d 2003); Wood v. Axis Energy Corp., 899 So.2d 138 (La. Ct. App. 3d 2005); Doré Energy Corp. v. Prospective Inv. & Trading Co., 2010 WL 4068802 (W.D. La. Oct. 14, 2010); Rathborne Land Co. v. Ascent Energy, Inc., 2008 WL 5427751 (E.D. La. Dec. 31, 2008), aff'd in part, vacated in part, 610 F.3d 249 (5th Cir. 2010); Middleton v. EP Energy E & P Co., 188 So.3d 263 (La. Ct. App. 2d 2016); Paulus v. Beck Energy Corp., 94 N.E.3d 73 (7th Dist. Ohio).
[i] Labor, Equipment, and Material Costs

In broad terms, the Kansas Supreme Court in *Reese Enterprises, Inc. v. Lawson* articulated that the following kinds of costs were relevant to the inquiry,⁴⁸ to wit: "All direct costs encountered, whether paid or accrued," of operation, including "labor, trucking, transportation expense, replacement and repair of equipment, taxes, license and permit fees, operator's time on the lease, maintenance and repair of roads, entrances and gates, and expenses encountered in complying with state laws which require the plugging of abandoned wells and prevention of pollution."⁴⁹

Cases have deemed relevant to a "paying quantities" analysis an array of expenses such as the following, to-wit:

- (1) costs for a pumper; 50
- (2) costs of fuel; 51
- (3) costs of electricity; 52
- (4) general labor, taxes, mileage, and annual taxes;⁵³
- (5) costs of cleaning a well; 54
- (6) transportation charges, taxes and switcher's fees, power bills;⁵⁵
- (7) routine maintenance; 56
- (8) severance taxes;57

⁴⁸ 553 P.2d 885, 898 (Kan. 1976) ("All direct costs encountered, whether paid or accrued, in operating the lease as a prudent operator are taken into account.").

⁴⁹ Id.

⁵⁰ Gypsy Oil Co. v. Marsh, 248 P. 329 (Okla. 1926); Persky v. First State Bank of Vernon, 117 S.W.2d 861 (Tex. Civ. App.—Amarillo 1938, no writ); Henry v. Clay, 274 P.2d 545 (Okla. 1954); CCH, Inc. v. Heard, 410 So.2d 1283 (La. Ct. App. 3d 1982); Peacock v. Schroeder, 846 S.W.2d 905 (Tex. App.—San Antonio 1993, no writ).

⁵¹ Gypsy Oil v. Marsh, 248 P. 329 (Okla. 1926).

⁵² CCH, Inc. v. Heard, 410 So.2d 1283 (La. Ct. App. 3d 1982); Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004).

⁵³ Hunter v. Booker, 104 So. 618 (La. 1925); Garcia v. King, 164 S.W.2d 509 (Tex. 1942).

⁵⁴ Barnard v. Gibson, 224 P.2d 90 (Cal. Dist. Ct. App. 1950); Lough v. Coal Oil, Inc., 266 Cal. Rptr. 611 (Ct. App. 1990).

⁵⁵ Fick v. Wilson, 349 S.W.2d 622 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.).

⁵⁶ Peacock v. Schroeder, 846 S.W.2d 905 (Tex. App.—San Antonio 1993, no writ).

⁵⁷ Hunter v. Booker, 104 So. 618 (La. 1925); Brown v. Sugar Creek Syndicate, 197 So. 583 (La. 1940); Gloria's Ranch v. Tauren Expl., Inc., 223 So.3d 1202 (La. Ct. App. 2d 2017), aff'd in part, rev'd in part, 252 So.3d 431 (La. 2018).

- (9) saltwater disposal;⁵⁸
- (10) pumping labor, field labor, auto/truck, road/location, chemical treating, taxes, well services, product/equipment services, services for leased equipment, other indirect services, and materials and supplies;⁵⁹ and
- (11) saltwater disposal payments and annual electric costs.⁶⁰

Depreciation [ii]

To be generous, the cases treating the subject of depreciation⁶¹ as an eligible item of expense to be deducted are less than uniform or consistent.⁶² The better way to view this issue was explained by one respected commentator, as follows:

once it is determined that the costs of casing, tubing, and the Christmas tree are costs of completing the well and preparing it for production, such costs would be eliminated from consideration in determining "paying quantities." Depreciation on such equipment should not be taken into account, because it is an accounting method of spreading the cost of equipment over its useful life that amounts to deducting costs of such equipment piecemeal.⁶³

equipment to which it relates is a part of the drilling and completion expenses.⁶⁴

In view of the foregoing, it seems logical that depreciation is *not* to be so included if the nent to which it relates is a part of the drilling and completion expenses.⁶⁴ Contrarily, in *Bales v. Delhi-Taylor Oil Corp.*, it was stated that "[i]t is now settled that depreciation on salvable equipment being used to produce gas from the well may be conducted as an operating expense. It is not included if the equipment is a part of the drilling and etion expense.⁶⁵ actual depreciation on salvable equipment being used to produce gas from the well may be considered as an operating expense. It is not included if the equipment is a part of the drilling and completion expense."65

⁵⁹ Ross Explorations, Inc. v. Freedom Energy, Inc., 8 S.W.3d 511 (Ark. 2000).

60 Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004).

⁶² Compare Ross Explorations v. Freedom Energy, Inc., 8 S.W.3d at 515 (Ark. 2000) (the "better view" is to exclude depreciation as a cost of operation), with cases cited in note 69, infra.

⁶³ 2 Eugene O. Kuntz, A TREATISE ON THE LAW OF OIL AND GAS § 26.7(*l*) (2021).

⁶⁴ Bales v. Delhi-Taylor Oil Corp., 362 S.W.2d 388 (Tex. Civ. App.—San Antonio 1962, writ ref'd n.r.e.); see also Mason v. Ladd Petroleum Corp., 630 P.2d 1283 (Okla. 1981).

⁶⁵ 362 S.W.2d at 391.

⁵⁸ CCH. Inc. v. Heard, 410 So.2d 1283 (La. Ct. App. 3d 1982).

⁶¹ "From an accounting perspective, depreciation is the allocation of the cost of a long-term plant asset over its useful life to the company." Kieso, Weygandt & Warfield, INTERMEDIATE ACCOUNTING 16E (Wiley, 2016), p. 96.

The court in *Texaco, Inc. v. Fox*⁶⁶ declined to follow the decision of the Oklahoma Supreme Court in *Stewart v. Amerada Hess Corp.*⁶⁷ that held that depreciation costs are relevant to the inquiry because "production-related equipment does have value that is being reduced through its continued operation."⁶⁸

As to equipment and material not consumed, a Texas case permits consideration of the *actual* depreciation on these items.⁶⁹ Or, as said by another court in Texas, "to show the depreciation allowed in the paying quantities calculation, landowners must show the cost of the particular equipment and its rate of depreciation."⁷⁰

The unique difficulty in fixing the correct amount of depreciation was recognized by one respected commentator, who stated, as follows:

If the life of a lease depends upon whether some form of depreciation is applied to a pump jack, it tells you the entire analysis is suspect. Courts have taken varying approaches to whether depreciation is considered as an operating expense. The only consensus appears to be that a depreciation deduction will not be allowed on initial drilling and completion costs. If a court decides to allow a depreciation expense, the next problem is to determine how depreciation should be calculated. Here too courts have taken varying approaches with most settling on "actual depreciation"--probably because they really don't feel comfortable allowing any at all. All you need is an expert qualified to testify regarding the rate at which a particular pump jack is wearing out.⁷¹

Nevertheless, depreciation was taken into consideration in several cases.⁷²

66 618 P.2d 844 (Kan. 1980).

⁶⁷ 604 P.2d 854 (Okla. 1979).

68 Id. at 857.

⁶⁹ Skelly Oil Co. v. Archer, 356 S.W.2d 774, 781 (Tex. 1961); cf. Transport Oil Co. v. Exeter Oil Co., 191 P.2d 129, 134 (Cal. Dist. Ct. App. 1948) ("There is room for argument, however, that depreciation might reasonably be treated as an operating cost."); Stewart v. Amerada Hess Corp., 604 P.2d at 857 ("depreciation should be mandatorily included as an item of lifting expense in determining whether there is production in 'paying quantities'").

⁷⁰ Evans v. Gulf Oil Corp., 840 S.W.2d 500, 505 (Tex. App.—Corpus Christi 1992, writ den'd).

⁷¹ David E. Pierce, "Duration of the Lease as Defined by the Habendum Clause," *Drafting and Negotiating the Modern Oil and Gas Lease*, 4-1, 4-20 (Rocky Mt. Min. L. Fdn. 2018).

⁷² United Cent. Oil Corp. v. Helm, 11 F.2d 760 (5th Cir. 1926) (Texas law); Whitaker v. Texaco, Inc., 283 F.2d 169, 176 (10th Cir. 1960) (applying Oklahoma law) (depreciation on "physical property installed to secure production"); Smith v. Marshall Oil Corp., 85 P.3d 830 (Okla. 2004).

[iii] **District Office Expenses**

The propriety of including expenses of district offices—salaries and employees' fringe benefits-might also be presented to the courts. Here, the question is how high up the corporate chain of command you can go. Who is the highest corporate employee whose costs might, in part, be attributed to this particular well?

To frame this issue by way of illustration, it is only logical that, if the lessee is a large, multinational major, integrated oil and gas company, operating and managing significant producing assets in many jurisdictions (domestic and foreign), a lessor would not be successful in attributing any expenses incurred above a rather low supervisory level in the corporate structure.

If, however, the lessee is a small, one- or two-person operation-a so-called "mom and pop" shop—the probability is greater that some portion of *all* costs and expenses is in play, and this is all the more the case if the company operates only one well or field.

In Mason v. Ladd Petroleum Corp., it was held that "district expenses" were "too indirectly and too remotely related to defendant's lifting or producing operations ... to be included in determining whether the well operates at a profit."⁷³ The court also observed that the expense of a district office "relates to and is made necessary by reason of corporate convenience or necessity, and not by reason of anything necessary or convenient for the lifting operations of the

well."⁷⁴ Hence, if these costs would be incurred by the operator regardless of the productive status of the well, they should not be treated as eligible expenses; rather, they should be allocated to a well only to the extent that such costs would be reduced by eliminating the well in question.⁷⁵ [iv] Administrative Overhead Expenses Preeminent commentators, Professors Martin and Kramer, have observed that "[t]here continues to be some doubt or dispute as to the inclusion of certain costs of the operator in deter-

continues to be some doubt or dispute as to the inclusion of certain costs of the operator in determining whether production is in 'paying quantities.' One such item is the overhead costs of the operator."76

Issues of allocation arise when multiple wells are at issue, and the overhead is generally applicable to all wells without distinction. In Sullivan & Garnett v. James,⁷⁷ the lessees chal-

⁷⁴ Id.

⁷⁵ Ladd Petroleum Corp. v. Eagle Oil & Gas Co., 695 S.W.2d 99, 108 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (if "administrative and district expenses would continue whether or not [the well in question] was producing, then such expenses should not be considered as overhead").

⁷⁶ 3 Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS: OIL AND GAS LAW § 104.6(b) (2020). The commentators identify cases addressing the issue, holding one way or another on the relevance of these costs.

⁷⁷ 308 S.W.2d 891 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

⁷³ 630 P.2d 1283, 1285 (Okla. 1981).

lenged a jury verdict that accepted the lessors' contention that operating and administrative expenses should be allocated on an *in globo* basis, rather than a "by well" basis.⁷⁸ The court left undisturbed the jury's finding on this issue:

Appellants' witnesses testified that the operating and administrative expenses should be allocated on the income basis, that is, if one well produces five times as much income as another it should be allocated five times as much expense, excluding ad valorem taxes and gross production tax. Thus, if a well produced as much as one dollar per annum revenue over and above taxes, it would be producing in paying quantities, regardless of the actual operating and administrative expenses incurred.⁷⁹

Other expenses, although not directly and exclusively related to the operation of a particular well, such as overhead and administrative costs (including postage, office supplies, telephones, etc.), have been urged by landowners to be deductible. However, the Oklahoma Supreme Court—noting a "diversity of views within the oil industry"—has stated that, "in determining whether a well is a producer, such administrative overhead expenses should be excluded."⁸⁰ In *Hininger v. Kaiser*, the lessor sought to distinguish *Mason* on the basis that "the charges for administration [in *Hininger*] are directly attributable to the leases in question," while "in *Mason*, it was necessary through accounting procedures, to divide such expenses between a number of leases with each lease supporting a percentage of the administrative expense."⁸¹ The court rejected this contention, noting, as follows:

If the mineral owners' argument is accepted, the result would inevitably be that small working interest owners would be faced with having to deduct administrative expenses from production proceeds, while large corporations or operators would evade such deductions based largely on simplicity versus complexity in accounting procedures. A more inequitable result is difficult to perceive.⁸²

Nevertheless, legal expenses and insurance directly attributable to that particular lease could be considered.

⁷⁸ "The appellants, Sullivan and Garnett, were operating the Shelly well on this lease together with five producing wells on other leases, making a total of six wells being operated as a unit, with the same operating and administrative expenses covering them." *Id.* at 893.

⁷⁹ Id.

⁸⁰ Mason v. Ladd Petroleum Corp., 630 P.2d 1283, 1286 (Okla. 1981).

⁸¹ 738 P.2d 137, 141 (Okla. 1987).

⁸² Id.

Research has disclosed no case where a court rejected or disallowed insurance premiums as being relevant to the inquiry. Two cases mention costs of insurance in a manner that intimate its relevance. In Peacock v. Schroeder, the Oklahoma Supreme court stated that "expenses [the operator] knows all wells will incur, such as taxes, transportation, *insurance*, office expenses, lease maintenance expenses, and so on."⁸³ The court in a Texas case, *Edwards v. Hardwick*, observed that "[t]hese expenses [do] not cover supervision time, use of trucks, bookkeeping and *insurance* or amortization of capital expenditure for the equipment. It is obvious that there was no profit to the working interest on the oil produced by this well."⁸⁴ Commentary also supports this proposition.⁸⁵

Operator's Overhead Expenses [**v**]

In Menoah Petroleum, Inc. v. McKinney, the Louisiana court undertook to "determine whether [the lessor] proved that [the lessee's] lease lapsed due to failure to produce in paying quantities in 1986."86 The court reviewed the revenue and expenses and concluded that the mineral lease ceased to produce in "paying quantities." In so doing, the court posited that, where a unit is being operated by a third party other than the lessee, it is appropriate to consider overhead expenses as operating expenses for purposes of determining whether a well is producing in "paying quantities."⁸⁷

In the subsequent case of *Edmundson Brothers Partnership v. Montex Drilling Co.*, the lessee argued, in reliance on *Menoah*, that "the operator's overhead must be excluded from the calculation of whether the Edmundson No. 1 well produced in paying quantities."⁸⁸ However, the court found that it need not reach "the question of whether operating expenses should be considered in connection with this issue," stating that, even excluding that expense, "the lease did not produce in paying quantities."⁸⁹ This holding was made in the face of a finding that the "lease produced a profit of \$139.00 per month for the eighteen-month period preceding the filing of suit."⁹⁰ Although the court did not explain why this "profit"—even if considered "small"—was not sufficient to up-

court did not explain why this "profit"-even if considered "small"-was not sufficient to up-

⁹⁰ Id.

^{83 846} S.W.2d 905, 909 (Tex. App.—San Antonio 1993, no writ) (emphasis added).

⁸⁴ 350 P.2d 495, 501 (Okla. 1960) (emphasis added.)

⁸⁵ See Caleb A. Fielder, Marginal Wells and the Doctrine of Production in Paying Quantities, 57 LANDMAN MAG. 2 (Mar./Apr. 2011) ("Conversely, insurance and transportation costs, as they are traceable to the well, would be included.").

⁸⁶ 545 So.2d 1216, 1220 (La. Ct. App. 2d 1989).

⁸⁷ Id.

^{88 731} So.2d 1049, 1058 (La. Ct. App. 3d 1999).

⁸⁹ Id.

hold the lease, the court's ruling was probably motivated by its finding of a lack of development on the part of the lessee.

[vi] Marketing Expenses

It is uncertain whether costs of marketing production are relevant to a "paying quantities" analysis. Indeed, the leading commentators on oil and gas law, while observing that there "is some doubt concerning the question whether marketing expenses are to be included as costs of the operation," then state that it "would seem that these are properly included in the calculation since unless the product is marketed there can be no paying production."⁹¹

One might quarrel with this reasoning for, under that standard, drilling and completion costs likewise might be considered since, unless the well is drilled and completed, there can be no production, "paying" or otherwise.

An implication in *Hunter v. Booker* suggests that costs incurred by the lessee in treating the product to make it marketable is a relevant consideration.⁹² However, the court did not engage in extended discussion of this issue because "the cost of this operation is not mentioned in the testimony."⁹³

The earliest reference to the purported relevance of "marketing costs" was contained in *Garcia v. King.*⁹⁴ In that case, the Texas Supreme Court enumerated an array of relevant factors to be considered in order to evaluate the issue of whether production is in "paying quantities," including the need that the lessee's production must "yield a profit over and above operating and *marketing expenses.*"⁹⁵ However, insofar as can be gleaned from the reported decision, the *Garcia* case did *not* involve any particular marketing costs.⁹⁶

While the term "lifting costs" is only a moniker to indicate that capital expenses to find the oil and gas are to be excluded, the term does connote a temporal element, that current operating costs incurred *prior* to the wellhead are inquiry-relevant.

This issue was considered by an appellate court in Ohio, and it was held that "gathering and compression fees are not expenses for purposes of a paying quantities analysis," the rationale

⁹³ Id.

Production in Paying Quantities Analysis

94 164 S.W.2d 509 (Tex. 1942).

⁹⁵ *Id.* at 510 (emphasis added).

⁹¹ 3 Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS: OIL AND GAS LAW § 104.6(b) (2020).

 $^{^{92}}$ 104 So. 618, 620 (La. 1925) ("There was an additional cost for treating this oil and taking the basic substance from it before it could be let into the pipeline, but the cost of this operation is not mentioned in the testimony.").

⁹⁶ A statement by a court as to an issue or matter not before it is called "*obiter dictum*." "The term '*dictum*' is generally used as an abbreviation of *obiter dictum*, which means a remark or opinion uttered by the way. Such an expression or opinion as a general rule is not binding as authority or precedent within the *stare decisis* rule." *Cates v. Cates*, 619 N.E.2d 715, 717 (Ill. 1993).

being that "[g]athering and compression costs are not directly related to the production of oil and gas. In fact, they become relevant only after oil and gas is produced."⁹⁷

In *Skelly Oil Co. v. Archer*,⁹⁸ the court permitted consideration of expenses to construct pipe line facilities in the analysis, but in denying error, the Texas Supreme Court withheld a view on that proposition by saying that, "[t]he holding that the cost of construction of a pipe line for marketing the gas should be included in determining whether the well or wells in question were producing oil in paying quantities is not before us, and we express no opinion thereon."⁹⁹ This statement of reservation hardly seems conducive to a finding of pertinence for these costs when the issue is presented to the Supreme Court.

In a state that abides by the "marketable condition" tenet of royalty valuation,¹⁰⁰ it might be that these costs are relevant to a "paying quantities" analysis, but in an "at the well" state, the costs should not be pertinent as the costs of marketing are incurred *after* the wellhead, being the point of royalty valuation.

[vii] Ad Valorem Taxes

Ad valorem taxes should be considered since "[t]hese annually recurring taxes are expenses which a prudent operator cannot ignore in an evaluation of whether to continue to operate the lease."¹⁰¹

In *Persky v. First State Bank of Vernon*,¹⁰² the court seemingly recognized that state or local taxes were relevant, but lacking proof by the lessor of the amount at trial, the court refused to take judicial notice of what the taxes might have been.

97 Neuhart v. TransAtlantic Energy Corp., 121 N.E.3d 802 (7th Dist. Ohio).

⁹⁸ 317 S.W.2d 47 (Tex. 1958) (Mem).

⁹⁹ Id.

¹⁰⁰ The marketable condition rule, which seems to prevail in <u>Colorado</u>, *Garman v. Conoco, Inc.*, 886 P.2d 652 (Colo. 1994); <u>Kansas</u>, *Gilmore v. Superior Oil Co.*, 388 P.2d 601 (Kan. 1964); <u>Oklahoma</u>, *Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998), and <u>West Virginia</u>, *Wellman v. Energy Res., Inc.*, 557 S.E.2d 254 (W.Va. 2001), posits that the implied covenant to market the product mandates that the lessee is to pay *all* "post-production costs" incurred in rendering the gas into a marketable product. *See* Patrick S. Ottinger, *A Funny Thing Happened at the Wellhead: "Post-Production Costs" and Responsibility Therefor*, 8 LSU J. OF ENERGY L. & RES. 1, 73 (2019).

¹⁰¹ Menoah Petroleum, Inc. v. McKinney, 545 So.2d 1216, 1221 (La. Ct. App. 2d 1989). Ad valorem taxes were also involved in *Gloria's Ranch v. Tauren Exploration, Inc.*, 223 So.3d 1202 (La. Ct. App. 2d 2017), aff'd in part, rev'd in part, 252 So.3d 431 (La. 2018).

¹⁰² 117 S.W.2d 861, 863–64 (Tex. Civ. App.—Amarillo 1938, *no writ*) ("As far as the taxes on the property are concerned, we would have no accurate method of ascertaining the amounts that might be due the respective political bodies. As most of our taxes are local, and all property is locally assessed and valued, we could not arrive at any correct amount to be deducted from the gross monthly receipts from the well. All such matters were available to the appellee in the trial of the case and we cannot supply such necessary items of proof omitted by it in the trial court.").

[d] Maintaining "Two Sets of Books"

"Maintaining two sets of books" is, regrettably, a pejorative concept in commerce. When used in this derogatory sense, it references a business keeping an accurate set of books for internal purposes, but also maintaining a second set of books to present to the tax authorities or other governmental agencies.¹⁰³ One would not want to be the litigant whom a trier of fact finds to have engaged in this sinister practice.

The operator who isolates certain expenses from the universe of costs reflected in the general ledger is, in essence, creating a separate book for the perfectly valid purpose of demonstrating or confirming that its lease is producing in "paying quantities." This is not only appropriate, but also essential and unavoidable.

Courts have been convinced by lessors challenging the validity of a mineral lease that the operator, in the necessary process of eliminating ineligible or irrelevant expenses in a "paying quantities" analysis, thus maintains "two sets of books."¹⁰⁴

These accusations are insupportable and fail to recognize that the process of creating an accounting record to accurately reflect the proper elements for such analysis necessarily starts with the main "book," and removes items that are capital in nature, or non-recurring and extraordinary. The resulting "book"—typically a spreadsheet—should not be seen as a product of a nefarious undertaking. It is, rather, unavoidable.¹⁰⁵

The inappropriateness of such disdainful treatment of an operator's isolation of eligible costs from unqualifying expenses resides in the difference between financial accounting and managerial accounting, which may be radically different applications from the same aggregated book of financial information.¹⁰⁶

Indeed, in production in "paying quantities" cases courts have acknowledged that "generally accepted accounting practices may lead to one result, whereas equally accepted accounting practices, using acceptable but alternate methods and practices, can result in an opposite result."¹⁰⁷

¹⁰³ See, e.g., Smith v. Superior Casing Crews, 299 F.Supp. 725, 730 (E.D. La. 1969) ("I credit the testimony that the plaintiffs accepted the checks because they were told that Superior had to have some way of manipulating its records so that the labor department would think that Superior was paying overtime; that the employees thought Superior had *two sets of books*, one for this purpose, and the other an accurate account." (emphasis added)).

¹⁰⁴ Gloria's Ranch v. Tauren Expl., Inc., 252 So.3d 431, 442 n. 11 (La. 2018) (expressing that the operator "participated in the accounting manipulations in an effort to make it appear that the lease was still producing in paying quantities" (emphasis added)).

¹⁰⁵ See Patrick S. Ottinger, *Maintaining 'Two Sets of Books' in a Production in 'Paying Quantities' Case:* Nefarious or Necessary?, 9 LSU J. OF ENERGY L. & RES. 435 (2021).

¹⁰⁶ Cecily A. Raiborn, Jesse T. Barfield & Michael R. Kinney, MANAGERIAL ACCOUNTING 45 (3d ed. 1999).

¹⁰⁷ Mason v. Ladd Petroleum Corp., 630 P.2d 1283, 1285 (Okla. 1981).

Certainly, counsel for the operator (who maintains the "books") should be prepared to provide relevant testimony to the trier of fact to demonstrate that context matters,¹⁰⁸ and that the elimination of certain irrelevant costs is neither a nefarious nor a sinister undertaking worthy of the disdainful reference to maintaining "two sets of books."





[e] Period of Time Considered

The landmark decision in *Clifton v. Koontz*¹⁰⁹ addressed the critical issue of the period of time that must be considered in a production in "paying quantities" analysis. As stated by the *Clifton* court: "We again emphasize that there can be no limit as to time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased."¹¹⁰

Certainly, one does not take a snapshot on any one particular day as it would fail to capture an array of expenses that are incurred on other days, and the production on the day in question may be more or less than what might be obtained over a period of time.

¹¹⁰ *Id.* at 690.

¹⁰⁸ See Figure 2, demonstrating an array of contexts in which a particular cost or expense is treated differently, albeit appropriately. The cost used is the expense item involved in *Lege v. Lea Exploration, Inc.*, 631 So.2d 716 (La. Ct. App. 3d), *writ den'd* 635 So.2d 1112 (La. 1994), that being the cost of converting an existing borehole to a saltwater disposal system. A large, full-color version of this figure may be found and downloaded at https://www.ottingerhebert.com/wp-content/uploads/Context-Matters.pdf.

¹⁰⁹ 325 S.W.2d 684 (Tex. 1959).

In *Texaco, Inc. v. Fox*, the Kansas Supreme Court took up the lessee's "contention regarding the accounting period,"¹¹¹ and found that a 13-year period was too long. However, it did not dispose of the case on that basis because it found that the lower court erred in including depreciation costs in the analysis, explaining as follows:

We reject this rationale and find this question was directly answered in *Reese* where we stated all direct costs encountered are taken into account and the initial cost of drilling and equipping the well is not a part of those operating expenses. Our review of the profit and loss statements show that cumulatively viewing the entire thirteen-year period, if depreciation on equipment is not taken into account, the lease is producing in paying quantities and has been producing in paying quantities from its inception. Therefore, although the use of the thirteen-year accounting period was unreasonably long, the error is of no consequence, as any combination of years will show production in paying quantities.¹¹²

In the case of *Barby v. Singer*,¹¹³ the Oklahoma Supreme Court considered the issue of whether leases being challenged had produced in "paying quantities." In a decision that identifies most of the pertinent state opinions on the topic, the court also said the following about the appropriate time period used to determine a well's profitability (the court used 14 months), towit:

In determining whether there was a cessation of profitable production sufficient to terminate a lease, no distinction is made under Oklahoma law between temporary termination of production, and reduction in production to the degree that the well ceases to be profitable. In either case, the appropriate time period is not measured in days, weeks or months, but by a time appropriate under all of the facts and circumstances of each case.¹¹⁴

A summary judgment in favor of a lessor finding a failure to produce in "paying quantities" for an eight-month period of time was reversed because the lessor "produced no evidence to show why the eight-month period was a reasonable period of time."¹¹⁵

- ¹¹⁴ *Id.* at 16–17 (footnotes omitted).
- ¹¹⁵ Dreher v. Cassidy Ltd. P'ship, 99 S.W.3d 267, 269 (Tex. App.—Eastland 2003, no writ).

¹¹¹ 618 P.2d 844, 847 (Kan. 1980).

¹¹² *Id.* at 848.

¹¹³ 648 P.2d 14 (Okla. 1982).

More recently, the Texas Supreme Court noted that, "[f]or purposes of determining whether a marginally productive well has ceased to produce in paying quantities, profitability must be measured over a reasonable period of time under the circumstances."¹¹⁶

In *BP America Production Co. v. Laddex, Ltd.*,¹¹⁷ the Texas Supreme Court affirmed a judgment of the court of appeals holding that the trial court incorrectly charged the jury as to the length of time applicable to a "paying quantities" analysis. The jury charge was found to be erroneous "because it limited the jury's consideration to the fifteen months of slowed production and, in turn, did not allow the jury to consider the well's return to profitability following that window."¹¹⁸ The court reiterated the following passage from *Clifton* with respect to the appropriate time period, to-wit: "There can be no arbitrary period for determining the question of whether or not a lease has terminated for the additional reason that there are various causes for slowing up of production, or a temporary cessation of production, which the courts have held to be justifiable."¹¹⁹

This author would posit that, although the cost of drilling a well is not a relevant consideration for purposes of evaluating production in "paying quantities,"¹²⁰ prevailing costs to drill a well (as well as prevailing in market conditions and existing infrastructure) should be relevant considerations in determining the time period in which the analysis should be made to the end that a longer (but still reasonable) period of time might be justified.

The period of time to be considered by the court is an important topic, and the reader is referred to a recent analysis of this issue.¹²¹

[f] Motivation of the Lessee

The analysis applicable to a discernment of whether a mineral lease is producing in "paying quantities," as noted above, entails a comparison of a certain stream of revenue to a certain class of expenses. This threshold inquiry is often called the "objective" standard.

If the lessee prevails at this point, the inquiry usually ends there. If, however, the comparison does not reveal at least a "small profit," revenue over relevant expenses, the analytical process turns to the next prong, often called the "subjective" standard.

- ¹¹⁹ Id. at 485 (quoting Clifton v. Koontz, 325 S.W.2d 684, 690 (Tex. 1959)).
- ¹²⁰ See § 1.02[2][b][i], supra.

¹²¹ Andrew D. Martin, *What is the Appropriate Time Period for a Paying Quantities Analysis?*, 8 LSU J. OF ENERGY L. & RES. 367 (2020). *See also* Morgan L. Simpson, *Should We Cycle Onto a New Analysis: Establishing the Proper Accounting Period for the Paying Quantities Analysis*, 56 WASHBURN L.J. 355 (2017).

¹¹⁶ BP Am. Prod. Co. v. Red Deer Res., LLC, 526 S.W.3d 389, 394 (Tex. 2017).

¹¹⁷ 513 S.W.3d 476 (Tex. 2017).

¹¹⁸ Id. at 484 (citing BP Am. Prod. Co. v. Laddex, Ltd., 458 S.W.3d 683, 689 (Tex. App.—Amarillo 2015)).

When Louisiana adopted its Mineral Code in 1974, made effective January 1, 1975, it repudiated a strict application of these standards as being the controlling precept in a "paying quantities" analysis. The law in Louisiana prior to 1975 was stated by the Louisiana Supreme Court as follows:

On several occasions this court has considered the question of what is production sufficient and requisite for the continuance of a lease in force and effect after the expiration of its primary term. And for determining it, the test applied has been whether the producing well or wells involved would provide a net profit to the lessee and furnish an adequate consideration to the lessor, the income of the latter from royalties being especially compared with the sums that he received in payment for the lease originally and for annual delay rentals.¹²²

This approach has been suppressed by articles 124 (first paragraph) and 125 of the Louisiana Mineral Code that provide as follows:

§ 124. Production in paying quantities required; definition

When a mineral lease is being maintained by production of oil or gas, the production must be in paying quantities. It is considered to be in paying quantities when production allocable to the total original right of the lessee to share in production under the lease is sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss.¹²³

§ 125. Amount of royalties relevant to reasonableness of lessee's expectation

In applying Article 124, the amount of the royalties being paid may be considered only insofar as it may show the reasonableness of the lessee's expectation in continuing production. The amount need not be a serious or adequate equivalent for continuance of the lease as compared with the amount of the bonus, rentals, or other sums paid to the lessor.¹²⁴

Professor Kramer resists the characterization of these two "prongs" or "tests" as being "objective" and "subjective." As he has explained: "A number of authorities label the two major tests the objective and the subjective tests. I prefer to label the test which relies on computations

¹²² Noel Estate, Inc. v. Murray, 65 So.2d 886, 888 (La. 1953).

¹²³ LA. REV. STAT. ANN. § 31:124.

¹²⁴ *Id.* at § 31:125.

as mathematical, and reserve the terms objective and subjective to describe whether or not a reasonable person or good faith analysis is applied."¹²⁵

Stripped to its essential objective, the test for production in "paying quantities" is designed to disallow a lessee from holding a lease for mere speculative purposes. As stated in Garcia v. King, "[t]he lessors should not be required to suffer a continuation of the lease after the expiration of the primary period merely for speculation purposes on the part of the lessees."¹²⁶

Consequences of Level or Quantity of Production Falling Below [g] "Paying Quantities"

It has been said that production that is not in "paying quantities" is no production at all for purposes of the mineral lease's habendum clause.¹²⁷ If that were a correct proposition, then the status of the mineral lease is as though production has ceased entirely, invoking the cessation of production clause¹²⁸ which, pursuant to Louisiana law, constitutes an express resolutory condition under article 133 of the Mineral Code.¹²⁹ This results in an *ipso facto* termination of the lease, without notice or demand.¹³⁰

But in this circumstance, there is production in fact, which seems inconsistent with a cessation of production. Certainly, if the production (albeit minimal) is saved and sold, royalties would be due on the produced oil and gas, notwithstanding its minimal quantity. This only makes sense: A fixed period in excess of ninety days is necessary in order to take into consideration all expenses and to mitigate against spikes or dips in pricing of product.

sense: A fixed period in excess of ninety days is necessary in order to take into considera-lexpenses and to mitigate against spikes or dips in pricing of product. If the cessation of production clause were made operative at the point that the level of tion ceases to be in "paying quantities," there would be no need or occasion to evaluate sonableness of the period of time that sets the appropriate time frame to evaluate the suf-y of production.¹³¹ Thus, the cessation of production clause of the mineral lease should not bring to the is a contractually-stipulated period of time (typically either sixty or ninety days, as set a the lease form) within which to undertake further operations or activities. Pather unless production ceases to be in "paying quantities," there would be no need or occasion to evaluate the reasonableness of the period of time that sets the appropriate time frame to evaluate the sufficiency of production.¹³¹

analysis a contractually-stipulated period of time (typically either sixty or ninety days, as set forth in the lease form) within which to undertake further operations or activities. Rather, unless

¹²⁸ See OTTINGER, MINERAL LEASE TREATISE, *supra* note 10, at § 4-11.

¹²⁹ See id., at § 13-15.

¹³⁰ See Smith v. Sun Oil Co., Inc., 135 So. 15 (La. 1931) ("We are of opinion that the lease has now ceased to produce either oil or gas in paying quantities. ... We think the lease has expired by its very terms.").

¹³¹ See § 1.02[2][e], supra.

¹²⁵ Bruce M. Kramer, Lease Maintenance for the Twenty-First Century: Old Oil and Gas Law Doesn't Die, It Just Fades Away, 41 ROCKY MT. MIN. L. INST. 15-1, 15-16 n.61 (1995) (citations omitted).

¹²⁶ 164 S.W.2d 509, 513 (Tex. 1942).

¹²⁷ Although your author has previously expressed this view, see Patrick S. Ottinger, Production in 'Paying Quantities'-A Fresh Look, supra note 10, at Page 670, his views of this issue have evolved and believes that the original statement was a bit too dogmatic or inflexible.

the level of production being obtained is akin to the "dribblings" or "mere smell of oil" previously noted,¹³² the proper analysis is to evaluate the "paying quantity" issues, taking into consideration the reasonable period of time.

Yet, if further drilling or reworking operations are undertaken, even while the ongoing level of production is contended to be suspect, those operations would suffice to maintain leasehold rights in force and effect under the "lease being otherwise maintained" provisions of the mineral lease.¹³³

[h] Relevance of Revenue and Expenses After Suit is Filed

A vexing issue is whether a mineral lessee should be penalized by withholding or refraining from capital investments after the lessor has asserted that the mineral lease has lapsed for failure to maintain production in "paying quantities." The lessee might very well desire to conduct further exploration activities, or even reworking operations, but would do so at its own peril, assuming that risk that the lessor's demands might be sustained by the court.

This is particularly true in light of recent decisions holding that a producer ceases to be in good faith after a suit is filed and, consequently, that the operator is not entitled to recover its costs and expenses from that date.¹³⁴

If, as a consequence of the lessee withholding expenditures, production diminishes after suit is filed, can such post-petition revenue be considered in the analysis? In *Noel v. Amoco Production Co.*, it was said that a "lessor is estopped from complaining about any alleged cessation of production in paying quantities that is the result of the lessee's failure to maintain and repair the wells during the pendency of the suit by the lessor."¹³⁵ This is consistent with the line of cases which excuses performance by the lessee during the pendency of a suit to cancel the lease, provided that the lessee prevails. ¹³⁶

However, in *Edmundson Brothers Partnership v. Montex Drilling Co.*, the court distinguished *Noel* on the basis that, in *Noel*, "the well was producing in paying quantities at the time suit was filed," whereas, in *Edmundson*, the plaintiff had "averred from the inception of the

¹³² *Supra* note 29.

¹³⁴ See Edmundson Bros. P'ship v. Montex Drilling Co., 731 So.2d 1049 (La. Ct. App. 3d 1999); Lamson Petroleum Corp. v. Hallwood Petroleum, Inc., 823 So.2d 431 (La. Ct. App. 3d), writ den'd 841 So.2d 796 (La. 2003). The courts relied on Louisiana Civil Code article 487 ("For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.") (emphasis added).

¹³⁶ See, e.g., Fomby v. Columbia County Dev. Co., 99 So. 537, 542 (La 1924) ("By filing and prosecuting these suits, plaintiffs have made it utterly impracticable for the assignees of the lessee to exercise the rights granted by the leases. Having made it thus impracticable by their own acts, plaintiffs are not in position to contend that the leases have expired.").

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¹³³ See OTTINGER, MINERAL LEASE TREATISE, supra note 10, at § 4-04(e).

¹³⁵ 826 F.Supp. 1000, 1016 (W.D. La. 1993).

suit that the . . . lease was not producing in paying quantities. There is nothing in the record which would tend to show that the production from the lease has been affected in any way by the suit."137

On the basis of this finding, the court in Edmundson found that "the receipts and expenses allocable to the lease since the suit was filed are relevant to the issue of whether production has been 'sufficient to induce a reasonably prudent operator to continue production in an effort to secure a return on his investment or to minimize any loss."138

One might argue that this finding in *Edmundson* was *dictum* as the court ordered the lease cancelled on a finding of lack of development. In any event, it is submitted that it is unjust to essentially penalize a lessee for failing to take those steps which it might otherwise be willing to take but for the fact that its lessor is suing it to cancel the lease. If the lessor prevails on the suit which it brought on the basis of pre-suit facts, that is one thing, but in the face of the cancellation suit which the lessee is defending, it is a bit of "having it both ways" to expect that the lessee will expend financial resources when the lessor is contending that the lessee no longer has a valid mineral lease.139

More recently, in Ferrara v. Questar Exploration and Production Co.,140 a case in which the lessor sought to dissolve a mineral lease based upon an alleged failure on the part of the lessee to explore or develop the leased property with respect to Haynesville Shale (not a production in "paying quantities" case), Questar contended on appeal that the trial court erred in its refusal to apply (a) the "suspension doctrine," (b) the lease's own suspension provision, and (c) the general rule that the plaintiff must prove its case.

The court agreed with Questar that, in order to prove whether a breach occurred as of the f suit, evidence of subsequent events would be irrelevant and inadmissible. However, it that the trial court tried to infer Questar's intent to explore or develop the Haynesville on or around the leased land and considered that the evidence of post-suit activity would be regate such intent. The court held, "Given the court's exceptionally broad discretion in on the admissibility of evidence, we cannot say this was plainly wrong. The fact that the court from admitting date of suit, evidence of subsequent events would be irrelevant and inadmissible. However, it stated that the trial court tried to infer Questar's intent to explore or develop the Haynesville Shale on or around the leased land and considered that the evidence of post-suit activity would prove or negate such intent. The court held, "Given the court's exceptionally broad discretion in ruling on the admissibility of evidence, we cannot say this was plainly wrong. The fact that the evidence was not admissible to prove the initial breach did not prevent the court from admitting it and assigning it the proper weight."¹⁴¹

In a forceful dissent from denial of an application for rehearing, Judge Caraway stated that a "misnamed suspension 'doctrine' is cast aside by the majority as untethered equity without any analysis of the parties' contractual obligations in this breach of lease action. The lessee is thus admonished for 'its dilatory conduct after suit was filed."142

 138 Id

¹³⁷ Edmundson Bros. P'ship v. Montex Drilling Co., 731 So.2d at 1057.

¹³⁹ Post-suit production was allowed to be considered in the Oklahoma case of *Duerson v. Mills*, 648 P.2d 1276 (Ok. Ct. App. 1982).

¹⁴⁰ 70 So.3d 974 (La. Ct. App. 2d), writ den'd 75 So.3d 943 (La. 2011).

¹⁴¹ LA. CODE OF EVID. art. 105.

¹⁴² 70 So.3d at 986.

Judge Caraway stated that the genesis for the rule that post-petition expenses should not be considered, is the instruction in Mineral Code article 119 that a "mineral lessor is bound to deliver the premises that he has leased for use by the lessee, to refrain from disturbing the lessee's possession, and to perform the contract in good faith."¹⁴³ Stating further, as follows:

If the lessor is wrong about the lessee's breach, the lessor's suit is a violation of his duty to refrain from disturbing the lessee's possession. The remedy for such a violation by a lessor, assuming the claim for dissolution was made in good faith, is to delay the lessee's obligation for continued performance until the suit has ended.¹⁴⁴

In *Kothman v. Boley*,¹⁴⁵ the Texas Supreme Court noted that "Lessors who thus wrongfully repudiate the lessees' title by unqualified notice that the leases are forfeited or have terminated cannot complain if the latter suspend operations under the contract pending a determination of the controversy and will not be allowed to profit by their own wrong."¹⁴⁶

[i] Burden of Proof

The burden of proof in a "paying quantities" case rests with the lessor.¹⁴⁷ A particular challenge is that, in the absence of a special lease provision that requires the lessee to provide certain specified information (*e.g.*, costs of operations, access to financial records), the lessor has no meaningful way, prior to filing suit, to ascertain the lifting costs, or current operating expenses, being incurred by the lessee in its production activities. The check stub statutes do not come to the aid of the lessor as information of this type is not required to be reported on the record accompanying the royalty check (an obvious proposition as a royalty owner bears no costs of operation and therefore is not concerned with expenses as a general matter).¹⁴⁸ Additionally, the information required to be reported by an operator to a state regulatory body does not encompass this relevant information.

¹⁴³ La. Rev. Stat. Ann. § 31:119.

¹⁴⁴ 70 So.3d at 986.

¹⁴⁵ 308 S.W.3d 1 (Tex. 1957).

¹⁴⁶ *Id.* at 4.

¹⁴⁷ "The petitioners did not discharge the burden which rested upon them to prove, as required, that the lessees failed to measure up to the standard of the prudent operator." *Clifton v. Koontz*, 325 S.W.2d 684, 695 (Tex. 1959). "Further, a party seeking to terminate a lease bears the burden of proof." *T.W. Phillips Gas & Oil Co. v. Jedlicka*, 42 A.3d 261, 267 (Pa. 2012). "The lessor has the burden of proving the grounds for the cancellation of a mineral lease." *Middleton v. EP Energy E & P Co.*, 188 So.3d 263, 266 (La. Ct. App. 2d 2016). "A plaintiff holds the burden of proving that a well is not producing in paying quantities." *Hogue v. Whitacre*, 103 N.E.3d 314 (7th Dist. Ohio). In the interest of full disclosure, the author was counsel to an operator client in the *Middleton* case.

¹⁴⁸ Louisiana's "check stub statute" is found in LA. REV. STAT. ANN. § 31:212.31.

§ 1.03 Survey of the Law of Certain Producing States on Production in Paying Quantities

As noted, while the law of most oil and gas producing states is quite similar with regard to "paying quantities," there are some differences in approach or the workings of the rule. Thus, consideration of the principal cases in particular states is instructive. Constraints on space preclude consideration of many significant oil and gas producing states.

Because of the nature of the oil and gas industry, and in recognition of the fact that there are certain issues, practices and principles (as well as operational activities or engineering functions), which are common in all oil and gas producing states, the courts of Louisiana have occasionally taken cognizance of the published decisions of other states where a particular issue has not previously been considered by a court in Louisiana.

As the Louisiana Supreme Court stated, "[a]lthough the decisions of other jurisdictions are not controlling on the Courts of Louisiana, if they determine an issue practically identical with the one under consideration, they possess at least a persuasive effect and merit attention."¹⁴⁹

Another Louisiana court has stated this understandable proposition, as follows:

Of course, such authorities [from courts of another state] are not binding on the courts of Louisiana; but as they determine an issue practically identical with the one in the instant case and constitute expressions of the highest courts of the named states, they possess at least a persuasive effect and merit our consideration and a discussion in this opinion.¹⁵⁰

This notion prevails also in other oil and gas producing states.¹⁵¹

With particular reference to a Federal court sitting in diversity jurisdiction, it is required to apply the substantive law of the applicable state, and is often required to make an "*Erie* guess."¹⁵²

¹⁴⁹ C H F Fin. Co. v. Jochum, 127 So.2d 534, 539 (La. 1961).

¹⁵⁰ Michiels v. Succession of Gladden, 180 So. 862, 864 (La. Ct. App. 2d), aff^{*}d 183 So. 217 (La. 1938).

¹⁵¹ <u>Colorado</u>: "We are unaware of any Colorado case addressing these issues. Under such circumstances, we may look to the decisions of other jurisdictions as persuasive authority." *LaFond v. Sweeney*, 343 P.3d 939, 945 (Colo. 2015). <u>Nebraska</u>: ". . . absent controlling decisions from state courts, precedents in other jurisdictions become persuasive." *Kresha v. Kresha*, 344 N.W.2d 906, 910 (Neb. 1984). <u>Texas</u>: "It has been held by this Court that, when we are called upon to decide a question of first impression in this state, we may look to other jurisdictions for guidance in reaching our decision on the question." *Hollins v. Rapid Transit Lines, Inc.*, 440 S.W.2d 57, 59 (Tex. 1969).

¹⁵² An "*Erie* guess" refers to the circumstance when a Federal court sitting in diversity jurisdiction has to "guess" as to how the highest court of the relevant state would decide an issue of first impression. *See Howe ex rel. Howe v. Scottsdale Ins. Co.*, 204 F.3d 624, 627 (5th Cir. 2000) ("The substantive law of this case is the law of Louisiana. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). (. . .. To determine Louisiana law on the [subject at issue], this Court should first look to final decisions of the Louisiana Supreme Court. *Id.* If the Louisiana Supreme Court has not ruled on this issue, then this Court must make an '*Erie* guess' and 'determine as best it can' what the Louisiana Supreme Court would decide.").

Certainly, the decisions of the courts of multiple states on the topic of production in "paying quantities" readily cite to decisions of other states without even the need for discussion or justification of crossing state boundaries.

[1] Louisiana

The notion that production must be of a certain quantity in order to maintain a mineral lease is as old as the industry itself. The earliest mineral lease in Louisiana jurisprudence contains an explicit requirement that production must be in "workable quantity."¹⁵³

The habendum clause is constituted as a matter of the term of the lease.¹⁵⁴ Hence, where production ceases to be in "paying quantities," unless the mineral lease is otherwise main-tained,¹⁵⁵ the lease comes to an end at such time as the it ceases to so produce and the requisite delays for further maintenance activity lapse.¹⁵⁶

One of the earliest cases in Louisiana on this topic was *Caldwell v. Alton Oil Co.*¹⁵⁷ In this case, the court stated that "[i]t was never contemplated that the lease under consideration should be continued for all time to come upon the mere production of oil in quantities not sufficient to compensate the lessee and totally inadequate as a consideration to the lessor for continuing the lease."¹⁵⁸ Thereafter, the courts continued to apply the two-prong test for "paying quantities," which was then modified by the adoption of the Louisiana Mineral Code, essentially codifying the ruling of *Clifton*.

[2] Ohio

Ohio is a state that does not explicitly subscribe to the precepts of *Clifton*, at least insofar as the courts have expressed. Thus, in *Blausey v. Stein*, the Supreme Court of Ohio, after articulating the traditional formulation as to the test for "paying quantities" production, then stated that "[i]n this cause, the well operated by appellee has been only marginally productive, and the determination of whether it produces in paying quantities hinges upon whether the value of appellee's own labor must be treated as an operating expense."¹⁵⁹

¹⁵³ Escoubas v. La. Petroleum & Coal Oil Co., 22 La.Ann. 280 (1870). The lease contract required the lessee to "make experimental borings on said land, and obtain oil or petroleum in workable quantity." *Id.* at 281. The mineral lease in *Escoubas* was granted on October 5, 1865, six months after the conclusion of the Civil War.

¹⁵⁴ See OTTINGER, MINERAL LEASE TREATISE, supra note 10, at § 4-06.

¹⁵⁵ See id., at § 4-04(e).

¹⁵⁶ See, e.g., Smith v. Sun Oil Co., 135 So. 15 (La. 1931).

¹⁵⁷ 108 So. 314 (La. 1926).

¹⁵⁸ *Id.* at 315.

¹⁵⁹ 400 N.E.2d 408, 410 (Ohio 1980).

The court concluded that the lower court erred in including such expenses, noting as follows:

Because an oil and gas lessee bears the risk of nonproduction in a lease of this kind, we believe that appellee should be allowed to attempt to recoup his initial investment for as long as he continues to derive any financial benefit from production. It is clear that appellee derives a small income from the sale of the oil he produces. We hold that this well is producing in paying quantities. The trial court erred in including the value of appellee's labor in its computation of operating expenses.¹⁶⁰

In an earlier case, the Ohio Supreme Court reversed an appellate decision that paid great deference to the judgment of the lessee as to the continuation of production, stating as follows: "Even *if*, as the Court of Appeals apparently held, the lessee's 'good faith judgment that the production . . . is "paying" must prevail' in determining whether there is production in paying quantities, there can be no such production if there is no production at all."¹⁶¹

More recently, in *Paulus v. Beck Energy Corp.*, the court stated it "essentially defers to lessee's judgment by allowing the lessee to continue even though the operation as a whole does not profit as long as the income minus current operating expenses makes a profit."¹⁶²

[3] Oklahoma

The courts of Oklahoma have contributed greatly to the body of jurisprudence pertaining to the issue of production in "paying quantities."

*Stewart v. Amerada Hess Corp.*¹⁶³ is an off-cited case in Oklahoma on the topic of "paying quantities" production, demonstrating that Oklahoma subscribes to the majority formulation.

The effect of a cessation of production was discussed in *Baytide Petroleum, Inc. v. Continental Resources, Inc.*¹⁶⁴ At issue was the point in time when a lease would be deemed to have lapsed by reason of the failure to produce in "paying quantities." Does the lease remain effective until the lease has been judicially canceled, notwithstanding the diminished level of production being obtained in the interim? Or does the mineral lease lapse under the lease's habendum clause when the lease ceases to produce in "paying quantities" in the secondary term?

¹⁶⁰ Id.

¹⁶¹ Hanna v. Shorts, 125 N.E.2d 338, 341 (Ohio 1955).

¹⁶² 94 N.E.3d 73 (7th Dist. Ohio). One court observed that "states which have [addressed the relevance of the lessee's good-faith judgment concerning profitability] only consider the lessee's good faith *in the context of sporadically or marginally producing wells.*" *Imperial Colliery Co. v. Oxy USA Inc.*, 912 F.2d 696, 705 (4th Cir. 1990) (applying West Virginia law) (emphasis added) (citing *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959)).

¹⁶³ 604 P.2d 854 (Okla. 1979).

¹⁶⁴ 231 P.3d 1144 (Okla. 2010).

The issue was presented because the lessee's obligation to accept a certain value for equipment was tethered to a period of six months *after* termination of the leases. The court held that "it is the failure to produce in paying quantities during the lease's secondary term rather than the entrance of a court order which terminates a lease."¹⁶⁵

[4] Pennsylvania

In Pennsylvania, the earliest pronouncement as to the proper test for evaluating whether an oil and gas lease is producing in "paying quantities" is the case of *Young v. Forest Oil Co.*¹⁶⁶ In *Young*, the Pennsylvania Supreme Court announced the general rule, but then stated that "paying quantities," therefore, is to be construed with reference to the operator, and by his judgment when exercised in good faith."¹⁶⁷

The foundational rule enunciated in *Young* was most recently considered in the significant case of *T.W. Phillips Gas & Oil Co. v. Jedlicka*.¹⁶⁸ The dispute in *Jedlicka* centered on competing views of the import of *Young* as it relates to the evaluation of the motive and judgment of the operator. In particular, the lessor contended that *Young* prescribed

an objective test—a mathematical calculation of profits—which, if the elements are not met, indicates the lease is not producing in paying quantities. She further contends that the good faith judgment of the operator is relevant only where a lease *is* producing in paying quantities—i.e., making a profit—but yet may not offset its total operational expenses.¹⁶⁹

Countering this contention, the lessee noted that the jurisdictions that embraced an objective standard "have explicitly held that the term to be used in assessing the performance of the lease should be one long enough to 'provide the information which a prudent operator would take into account in [deciding] whether to continue or abandon operation."¹⁷⁰

The court did not accept the view as posited by the lessor, and held to its view that "*Young* requires consideration of the operator's good faith judgment *as part* of the assessment of whether the lease produces in paying quantities."¹⁷¹ With one Justice concurring and one dissenting, the majority of the court stated that "a determination of whether the well has produced in

- ¹⁶⁶ 45 A. 121 (Pa. 1899).
- ¹⁶⁷ Id. at 123.
- ¹⁶⁸ 42 A.3d 261 (Pa. 2012).
- ¹⁶⁹ Id. at 272.
- ¹⁷⁰ Id. at 271 (alteration in original).
- ¹⁷¹ *Id.* at 272.

¹⁶⁵ *Id.* at 1149.

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paying quantities requires consideration of the operator's good faith judgment in maintaining operation of the well."¹⁷²

Factually, the court in *Jedlicka* found that the trial court was not in error in finding that the lease was producing in "paying quantities," notwithstanding that the lessee suffered a \$40 loss in 1959.¹⁷³ The trial court determined that "'[t]he evidence indicates that the lessees were operating the wells in good faith,' and, on this basis, that the wells had produced in paying quantities."¹⁷⁴

[5] Texas

It might have been logical to dispense with an alphabetical approach and to give consideration to the jurisprudence of Texas as a seminal matter inasmuch as its landmark pronouncement in *Clifton v. Koontz*¹⁷⁵ has been embraced by the courts of most states. In that decision, the court's pronouncement was explained, as follows:

The generally accepted definition of "production in paying quantities" is stated in the Garcia case, supra, to be as follows:

"If a well pays a profit, even small, over operating expenses, it produces in paying quantities, though it may never repay its costs, and the enterprise as a whole may prove unprofitable."

In the case of a marginal well, such as we have here, the standard by which paying quantities is determined is whether or not under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate a well in the manner in which the well in question was operated.¹⁷⁶

More recently, in *BP America Production Co. v. Laddex, Ltd.*, the Texas Supreme Court reinforced the principles enunciated in *Garcia* and *Clifton*, but addressed the issue of a jury

¹⁷² *Id.* at 276.

¹⁷³ *Id.* at 277.

¹⁷⁴ *Id.* (emphasis in original).

¹⁷⁵ 325 S.W.2d 684 (Tex. 1959).

¹⁷⁶ Id. at 690–91 (quoting Garcia v. King, 164 S.W.2d 509, 511 (Tex. 1942)).

instruction that limited the inquiry to a 15-month period of time, an instruction the court found to be erroneous.¹⁷⁷

§1.04 Effect on the Paying Quantities Analysis of Circumstances Beyond Control of Lessee

[1] Preface

Despite the fact that a lessee might administer its lease in a manner that comports with its duty to perform the contract as a reasonably prudent operator, for the benefit of both the lessor and lessee,¹⁷⁸ circumstances might be presented that frustrate its overall goal to produce and market production in a way that maximizes value.

[a] Market Conditions

Factors that are beyond the control of the lessee and that put stress on the value of production include external market conditions that are greatly influenced by supply and demand and by pandemic or other external circumstances. When commodity prices are low, there is not necessarily a commensurate or concomitant reduction of costs of operation, although it is not uncommon for a contractor to reduce prices at times of low activity. Even when that occurs, the reductions in cost by a contractor are certainly not on a one-to-one basis *vis-á-vis* prices for commodities of oil and gas, even on a percentage basis.

As these circumstances exist, and an inquiry into the "paying quantities" status of production arises, the motivation and thinking of the lessee in continuing production becomes particularly relevant. Mindful of these conditions, a court should evaluate the actions of a lessee through the lens of the reality of marketing conditions. Were it otherwise, and were a mechanical, unforgiving standard applied, many leases might not survive the inquiry, resulting in the wholesale loss of mineral leases. This is clearly not in the public interest.¹⁷⁹

 $^{^{177}}$ 513 S.W.3d 476, 486 (Tex. 2017) ("Accordingly, we conclude that the charge in this case did not permit the jury to appropriately discharge its fact-finding duties, and we cannot say that a properly instructed jury could have reached only one verdict."); *see* § 1.02[2][e], *supra*.

¹⁷⁸ In Louisiana, this duty is embodied in LA. REV. STAT. ANN. § 31:122.

¹⁷⁹ Unless it does violence to the commercial expectations of the lessor, and constitutes speculation on the part of the lessee, sound public policy should promote the continuation of a mineral lease that, although marginally profitable at a particular moment, would leave hydrocarbons "stranded" in the earth if the lease were allowed to lapse. It is unlikely that another operator would undertake operations to recover "stranded" hydrocarbons if the reservoir had for the most part been depleted, and leaving such otherwise producible oil or gas in the ground is not in the interest of conservation. By way of analogy or illustration, the laws that reduce the rates of severance taxes for marginal or "stripper" wells are designed for essentially the same reason. A "stripper" well is an oil well that is "certified by the Department of Revenue that such well is incapable of producing an average of more than ten barrels of oil per producing day during the entire taxable month." LA. REV. STAT. ANN. § 47:633(7)(c)(i)(aa).

The landmark case of *Clifton* recognized the relevance of the price received for product as being a consideration in evaluating the conduct of the lessee.¹⁸⁰

Professor Kuntz notes that a lessee's decision to continue production might be motivated by the lessee's anticipation of "a change in marketing conditions or market prices of oil or gas."181

The court in Paulus v. Beck Energy Corp.¹⁸² recognized that depressed commodity prices might be a consideration, but did not find that factor to be sufficient to save the lease where production was in decline.

Assuming that the marketing efforts of the lessee were prudent and taken in good faith, and unless the production is declining by reason of approaching depletion of the resource, the revenue received should not be viewed in isolation as any indicia of speculation.

Temporary Cessation of Production Doctrine [b]

The Texas Supreme Court has held that, even in a mineral lease that is silent as to the lessee's obligation to continuously maintain production or to restore production once it ceases, a "temporary cessation" clause is "necessarily implied."¹⁸³

To prevent the termination of the lease under an implied temporary cessation clause, (1) the cessation of production in the words of the courts must be "due to a sudden stoppage of the well or some mechanical breakdown of the equipment used in connection therewith, or the like," and (2) the lessee must remedy the problem and resume production within a "reasonable time."¹⁸⁴ The lessee has the burden of proving that the cause of the cessation is of a type or nature envisioned by the doctrine—"some mechanical breakdown . . . or the like."¹⁸⁵ In *Natural Gas Pipeline Co. of America v. Pool*,¹⁸⁶ the Texas Supreme Court reversed the lower court's decision that had ruled that the leases at issue had terminated under the temporary cessation of production doctrine. The majority of the court chose not to invoke the doctrine, basing its decision instead on its determination that, even assuming that the leases had lapsed, the

¹⁸⁰ 325 S.W.2d at 691 ("the price for which the lessee is able to sell his produce . . . [and] his net profit").

¹⁸¹ 2 Kuntz, *supra* note 63, §§ 26.7(e), (f), (g).

¹⁸² 94 N.E.3d 73 (7th Dist. Ohio). As noted in note 47 supra, the Paulus case cited Lege v. Lea Exploration, Inc. as persuasive authority.

¹⁸³ Mw. Oil Corp. v. Winsauer, 323 S.W.2d 944, 946 (Tex. 1959).

¹⁸⁴ Id. at 947 (quoting Watson v. Rochmill, 155 S.W.2d 783, 784 (Tex. 1941)).

¹⁸⁵ See Bradlev v. Avery, 746 S.W.2d 341, 343 (Tex. App.—Austin 1988, no writ).

¹⁸⁶ 124 S.W.3d 188 (Tex. 2003), rev'g 30 S.W.3d 618 (Tex. App.—Amarillo 2000) & 30 S.W.3d 639 (Tex. App.—Amarillo 2000). Closely watched by the practicing oil and gas bar, Pool was argued on March 6, 2002, and was under deliberation for 17¹/₂ months before the original decision was rendered.

lessees "thereafter acquired by adverse possession fee simple determinable interests in the mineral estates that are identical to those the lessees held under the leases."¹⁸⁷

The temporary cessation of production doctrine has been discussed in other states, not always with a consistent result.¹⁸⁸

No Louisiana case has addressed this issue in those precise terms, perhaps because most—if not virtually all—mineral leases contain an express clause addressing this issue.¹⁸⁹ Since the lease contains an *express* provision regulating the term of the lease, the court would be without authority to *imply* a provision contrary to the express clause.¹⁹⁰

[2] Lease Provisions Pertinent to the Issue

Although the habendum clause of the mineral lease is front and center in a "paying quantities" analysis, other lease provisions could have relevance to protect a lessee from lease termination that might otherwise result.

[a] Shut-In Clause

Production in Paying Quantities Analysis The shut-in clause of a mineral lease would provide relief to the lessee from a strict application of a habendum clause where the lessee has discovered commercial reserves but is unable to produce them for some reason.¹⁹¹ Thus, this contractual innovation specifies the circumstances under which the mineral lease might be maintained, in the absence of some other basis of maintenance, if a well is drilled and is capable of producing but is not in fact producing for a reason envisioned by the lease clause.

On more than one occasion, this author has heard the view expressed that the lessee can maintain leasehold rights when a well is shut in, regardless of when that occurs or of the conditions that necessitated the shutting-in of the well. Maybe. But maybe not. It depends on the

¹⁸⁷ *Id.* at 190.

¹⁸⁸ <u>Arkansas</u>: Reynolds v. McNeill, 236 S.W.2d 723 (Ark. 1951); <u>Kentucky</u>: Lamb v. Vansyckle, 266 S.W. 253 (Ky. 1924); <u>North Dakota</u>: Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969); <u>New York</u>: Peckham v. Dunning, 125 N.Y.S.2d 895 (Sup. Ct. 1953); <u>Pennsylvania</u>: Cole v. Philadelphia Co., 26 A.2d 920 (Pa. 1942); <u>West Virginia</u>: Bryan v. Big Two Mile Gas Co., 577 S.E.2d 258 (W.Va. 2001).

¹⁸⁹ In George Hazlett, *Effect of Temporary Cessation of Production on Leases and Term Royalties*, 10 INST. ON OIL & GAS L. & TAX'N 201, 248 (1959), the author observed that the "cases above cited were decided on the basis of the habendum clause alone, as with only rare exceptions the leases . . . involved did not contain qualifying provisions such as the 'cessation' clause."

¹⁹⁰ See La. Gas Lands, Inc. v. Burrow, 1 So.2d 518, 521 (La. 1941) (implied obligation cannot "be invoked so as to erase entirely from the contract those provisions which expressly declare that the lessee's rights shall continue so long as gas is produced in paying quantities"); *cf. Exxon Corp. v. Atl. Richfield Co.*, 678 S.W.2d 944, 947 (Tex. 1984) ("All parties agreed upon the termination clause. These clauses expressly and unambiguously set out the terms under which the contract could be terminated. There can be no implied covenant to the contrary.").

¹⁹¹ See OTTINGER, MINERAL LEASE TREATISE, *supra* note 10, at § 4-13.

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particular language of the lease's shut-in clause, which invokes the general notion of "freedom of contract."¹⁹²

[b] Force Majeure Clause¹⁹³

Courts are reluctant to entertain a force majeure defense regarding performance that was merely rendered more difficult, inconvenient, unprofitable, or otherwise undesirable.¹⁹⁴

An assertion of irresistible force was rejected in one Louisiana case, with the court explaining as follows:

Our settled jurisprudence is that the obligor is not released from his duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event or an irresistible force. Here, as we have pointed out, performance was not rendered impossible but only more difficult or more burdensome.¹⁹⁵

In a "take or pay" case in which the gas purchaser sought to be relieved of its obligations, the court held that "adverse economic conditions and modifications in governmental regulations and policy which tend to render performance burdensome and unprofitable do not constitute force majeure."¹⁹⁶

In Texas, efforts to invoke the force majeure clause have not been received with success by the courts. Thus, in *Valero Transmission Co. v. Mitchell Energy Corp.*,¹⁹⁷ the court rejected a contention that a "catch-all" clause in a force majeure provision in a gas sales contract provided contractual authority to relieve a party from the consequences of a drastic drop in commodity prices.

¹⁹² See Patrick S. Ottinger, *Neither Fish nor Fowl: The Louisiana Law of Shut-In Gas Wells*, 69 LA. L. REV. 43 (Fall 2008).

¹⁹³ See Ottinger, Mineral Lease Treatise, *supra* note 10, at § 13-34(k).

¹⁹⁴ See Payne v. Hurwitz, 978 So.2d 1000, 1005 (La. Ct. App. 1st 2008); Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp., 889 F.2d 621, 626 (5th Cir. 1989) (applying Louisiana law); Sabre Indus., Inc. v. Module X Solutions, LLC, 2017 WL 4237919, at *3 (W.D. La. Sept. 22, 2017) (applying Louisiana law).

¹⁹⁵ Schenck v. Capri Constr. Co., 194 So.2d 378, 380 (La. Ct. App. 4th 1967) (citations omitted).

¹⁹⁶ Hanover Petroleum Corp. v. Tenneco Inc., 521 So.2d 1234, 1240 (La. Ct. App. 3d 1988).

¹⁹⁷ 743 S.W.2d 658 (Tex. Civ. App.—Houston [1st Dist.] 1987, no writ); see also TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. den'd) (involving force majeure clause in farmout agreement).

§ 1.05 Conclusion

Professor Owen L. Anderson has articulated that "a royalty clause should be construed in its entirety . . . and in light of the fact that the royalty clause is the means by which the lessor receives the primary consideration for a productive lease."¹⁹⁸

Concordant with that proposition, the Louisiana Supreme Court has noted that "the main consideration of a mineral lease is the development of the leased premises for minerals."¹⁹⁹

As relates to production from a mineral lease, the topic of production in "paying quantities" is one that is presented in all mineral leases, even if the words "paying quantities" do not appear in the text of the lease. It announces a sound proposition that provides to the lessor a safeguard against speculation and self-serving on the part of the lessee, while affording appropriate discretion to the lessee to plan its affairs accordingly.

In times, such as April 2020, when marketing conditions are "upside down," courts should be sensitive to a policy that, while mindful of the rights of the parties, recognizes that exigent circumstances beyond the control of the lessee might impose a particular stress on the revenue that the lease is able to generate. Economic conditions and marketing circumstances change over time (compare 2020 to 2022), and while the court should be diligent in assessing any speculative motive on the lessee's part, the lessee should be allowed to make prudent decisions that would benefit both parties to the lease relationship. Aberrations in the pricing of commodities due to these conditions might be assuaged by embracing a longer period of time to evaluate the "paying quantities" status of the production being obtained.

¹⁹⁸ Owen L. Anderson, *Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2*, 37 NAT. RESOURCES J. 611, 636 (1997).

¹⁹⁹ Carter v. Arkansas Louisiana Gas Co., 36 So.2d 26, 28 (La. 1948).

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So, You Want to Drill Your Own Oil Well? - An Oil and Gas Drilling Primer

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By: Frank N. Cusimano, III

1. INTRODUCTION

Overview. The purpose of this paper is to give a lawyer who might be new to the oil-and-gas industry a broad overview of the process of drilling and producing an oil and gas well. It is written from the perspective that a person is thinking about drilling an oil well. Thus, what follows are some of the steps that such a person would need to take to drill and produce that well.

Technical. As such, this topic is somewhat technical in nature. Accordingly, this paper might be best written by someone with a technical background, such as a geologist or an engineer. Instead, however, it is written by a lawyer who has decades of experience in the oil and gas industry.

The Plan. This paper will begin with a broad and simplified discussion of what geologists do. It will then move into the process of drilling an oil and gas well and bringing the oil, gas, and water to the surface. It will then discuss the process of selling the oil and gas and disposing the water. Periodically, the paper will discuss some of the types of agreements that are needed to accomplish the tasks at hand.

Assumptions. In discussing this topic, this paper makes several assumptions about the hypothetical well that is being drilled in this instance: it is in Texas; it is onshore (as opposed to offshore); it is an oil and gas well (as opposed to a gas-only well); it is a vertical well (as opposed to a horizontal well). However, this paper will briefly mention a few things about horizontal drilling and hydraulic fracturing ("fracking"). Another assumption is that the well is being drilled on privately-owned minerals (as opposed to government-owned).

Basic. This paper is conceived and written with the idea that the reader is a new-to-the-oil-and-gas-industry lawyer. Therefore, any readers who have substantial experience in this industry, or a technical background, may find this material to be rather basic.

ACKNOWLEDGEMENT

The author thanks Mr. Berry Simpson who provided much of the technical content of this paper. An additional source of information is Van Dyke, Kate - Fundamentals of Petroleum, Fourth Edition, 1997; Petroleum Extension Service; Division of Continuing Education; The University of Texas at Austin, Austin, TX.

BASIC GEOLOGY AND WHAT GEOLOGIST DO (SIMPLIFIED)

3.1 Basic Geology

Where and How Deep? So, you want to drill your own oil well? The first question you must ask yourself is where in this wide world are you going to drill it. The second question probably is - how deep are you going to drill it. Well, a geologist can tell you those two things.

Oversimplification. What follows next is an oversimplification of what geologist do. For that simplification, the author apologizes to any geologist readers. However, please understand that this oversimplification is done for the sake of expediency and is no in no way a reflection of the

author's view of geologists. In fact, the author greatly admires the knowledge, intelligence, and steadfastness of those who endeavor in the geology field.

3.2 What Geologist Do

Data. The first thing geologists do is collect data on the area where the well is to be drilled. They will collect seismic data, well logs, core samples, perhaps even reference material or sources regarding the subject "basin" (more on that later), and numerous other types of data. Then they will take those data and use them to attempt to create maps of the underground. They will then study those maps, searching for likely oil and gas-bearing formations, and traps and seals which likely trapped the oil and gas in place in sufficient enough quantities to make it economic to drill for and produce that oil and gas.

Porous and Permeable Rock. Regarding an oil and gas-bearing formation, what the geologist is looking for is porous and permeable rock. Porosity and permeability will be defined and discussed in more detail later. In the underground, there are no "caverns" full of oil and gas. The oil and gas are embedded in the rock. In fact, the English word, "petroleum" comes from the Greek word meaning "rock oil".

3.3 Geology - Origin of Oil and Gas

To understand more about what oil and gas-bearing formations are, one must first understand the origin of oil and gas. What follows is called the "organic theory" of the origin of oil and gas.

Organic Theory. In the ancient time (200 to 300 million years ago), there had to have been a warm shallow sea, or bay, or "basin". This bay was fed by rivers which bring organic material into the shallow sea. Also in the bay are coral reefs and other marine life. In other words, there are sources of copious amounts of organic material.

Organic Material. Marine organisms and plant and animal remains fell to the bottom of this basin. These remains formed thick deposits of organic rich sludge at the bottom of the bay. Overlying sediments buried these organic remains along with mud and saltwater so deeply that they eventually turned into solid rock. Heat, pressure, and chemical reactions transformed the sludge into oil and gas. This organic material was protected from ordinary decay. (There was no oxygen or sunlight, plus the salt from the saltwater helped prevent decay.)

3.4 **Geology – Rock Properties**

Porosity. Oil and gas migrated into reservoir rock which must have plenty of room inside to trap oil, like a sponge. This characteristic of the rock is referred to as its porosity. Oil and gas are lighter than water; they therefore will migrate toward the surface. The hydrocarbons are also under lighter than water; they therefore will migrate toward the surface. The hydrocarbons are also under pressure; therefore, they will migrate to areas of low pressure, i.e., also toward the surface. If they are not trapped in place, the oil and gas will eventually work their way to the surface. The location at the surface where the oil and gas express is called a "seep".

Oil Seeps. If you are familiar with the old American TV show called "The Beverly Hillbillies", then you know that one day, "Uncle Jed was out "shootin' at some food, and then up through the ground came a bubblin' crude." That scene at the beginning of the show contains a depiction of an oil seep.

Traps and Seals. However, for the oil and gas not to seep out and be lost at the surface, there must be structural traps for the oil and gas to accumulate in large quantities. The traps must be sealed with impermeable layers of rock to hold the oil and gas in place. There are many different types of traps in the underground, e.g., "dome" traps and "fault" traps.

Permeability. As stated, the oil and gas-bearing rock (formation) must be porous. That is, there must be space inside the rock for the oil gas and water to exist. Another characteristic of a good oil and gas-bearing formation is permeability. That is, there must be "pathways" through which the oil and gas is able to flow to move from pore to pore within the rock. The ease with which fluid moves through the interconnected pore spaces of rock is called permeability. The higher a rock's permeability, the easier it is for hydrocarbons to move from pore to pore within the rock.

Relationship between Porosity and Permeability. The relationship between the porosity and the permeability of a given formation is not necessarily a close or direct one. However, high porosity is often accompanied by high permeability. Nevertheless, some rock can be porous, but not permeable.

Sand. Imagine sand being compressed down and formed into rock. As you might surmise, such rock will be both porous and permeable. Now imagine mud being compressed down and formed into rock. As you might also surmise, such rock might be somewhat porous and contain oil, gas, and water, but that kind of rock will not be permeable. Fluids will not be able to move through it and into an oil and gas well drilled into that formation.

Mud. Mud that became rock is called "shale". Some examples are the Barnett Shale, and the Eagle Ford Shale. Shales are impermeable. However, oil and gas operators can extract hydrocarbons from shale through the combined techniques of horizontal drilling and hydraulic fracturing or "fracking".

Fracking. Fracking is the process of pumping large amounts of water, proppant (e.g., sand) and some chemicals into the formation at extremely high pressure to fracture (or crack) the rock. The sand or proppant remains in the cracks to keep them propped open after the water is pumped out. Otherwise, the fractures would close. These fractures provide the pathways for the oil and gas to move through the rock. In this way, a sort of "man-made" permeability is created in the formation.

Unconventional vs. Conventional Resources. Hydrocarbons that are contained in shale formations are sometimes called "unconventional resources". Similarly, the processes of horizontal drilling coupled with hydraulic fracturing that are used to capture hydrocarbons from unconventional resources are sometimes called "unconventional drilling". On the other hand, hydrocarbons trapped in porous and permeable rock, and the drilling processes to capture them, are sometimes referred to as "conventional resources" and "conventional drilling", respectively. The remainder of this paper deals only with conventional resources and conventional drilling.

3.5 What Geologists Do (Continued)

Maps. To summarize, geologists must look for porous and permeable rock, along with traps and seals that have trapped the oil and gas in place in such quantities that it will be economic to drill for and produce that oil and gas. To do so, geologists will more than likely create maps of the

underground and study them. With today's technology, geologists can create 3D or 4D images of the underground which they can study to find good rock with traps and seals.

Drill Here. After many hours of collecting data, creating maps, and studying all of it, your geologist should be able to tell you where to drill your well and how deep to drill it. First, however, you will need to acquire the right to drill the well at that location.

4. INITIAL AGREEMENTS

4.1 Subsurface Rights – acquiring the hydrocarbons in place or the right to drill for them.

Acquiring the Right. The oil and gas in place may be acquired in several ways. The hydrocarbons can be acquired indefinitely through a **Mineral Deed**, or they may be acquired for a limited time through an **Oil and Gas Lease**. Unlike other property leases, e.g., an apartment lease, an oil and gas lease in Texas is a conveyance of a fee simple, determinable title to the oil and gas in place. See *Jupiter Oil Co. v. Snow*, 819 S.W.2d 466 (Tex. 1991).

In Louisiana, however, solid minerals are insusceptible of ownership apart from the land until reduced to possession. La. R.S. 31:5. Accordingly, the oil and gas operator must obtain the right to explore for and produce the oil and gas via a mineral servitude, La. R.S. 31:21, which can also be obtained through an Oil and Gas Lease.

The Dominant Estate. With either an oil and gas lease or a mineral deed, you will have the right to go onto the surface of the property to begin drilling operations to capture your oil and gas. In Texas, if the mineral estate of the land at issue has been severed from the surface estate of that land, the mineral estate is dominant over the surface estate. *Warren Petroleum Corp. v. Martin,* 271 S.W.2d 410 (Tex. 1954). Even if someone else owns the surface estate as is reasonably necessary to conduct your mineral operations, *Warren Petrol. Corp. v. Monzingo,* 304 S.W.2d 362 (Tex. 1957), unless the deed or lease specifically provide otherwise. Oil and gas leases especially, and mineral deeds to some extent, often contain numerous other terms and conditions, the details of which will not be discussed here.

The same is true in Louisiana in that the mineral servitude owner has the same rights as a surface owner to use the surface of the land to conduct exploration and production operations. La. R.S. 31:23.

Assignment. Often however the property on which you would like to drill your oil and gas well is likely already leased by someone else. If that is the case, you may go to that person and seek from them an **Assignment** or a **Term Assignment** of their lease to you.

Farmout Agreement. Alternatively, you might seek a **Farmout Agreement** from the person who already owns the oil and gas lease on the property you desire. Under a farmout agreement, the lessee grants you the right to come onto the property to drill a well. If you do so and the well is successful, you will have then earned the right to an assignment of a portion of the oil and gas lease to cover the acreage assigned to your oil and gas well.

Joint Operating Agreement. In some instances, you may not be able to acquire 100% of the mineral estate. In other instances, you might seek to spread the risk or to raise some

How to Drill a V

capital for your drilling operations. In both of those cases, you will have co-owners of the minerals with you. In that event, it is best if you have a **Joint Operating Agreement** among you and your other co-owners. The Joint Operating Agreement will name one person as the operator, and it will set out how the cost of the operations and the revenues generated therefrom will be allocated among the co-owners.

Drilling Contract. Since most oil and gas operators do not own their own drilling rigs, and since drilling oil and gas wells is a specialized service, you will probably need a **Drilling Service Contract** with a drilling company.

4.2 Surface Issues

Surface Use Limitations. In Texas, since, as stated above, the mineral owner or the oil and gas lessee each has the right to use as much of the surface as is reasonably necessary to conduct operations, he or she does not need an agreement with the surface owner to drill a well and produce it (unless the mineral deed or oil and gas lease specifically provides otherwise). See *Monzingo, supra*. However, under the law, the mineral owner may not use more of the surface than is reasonably necessary for drilling and production operations. *Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133* (Tex. 1967). In addition, the mineral owner must not negligently damage the surface of the property while conducting operations. *Ibid.*

Surface Damage Agreement. For those reasons, to avoid possible disputes and as a courtesy to the surface owner, the industry practice in Texas is for the mineral owner to enter into a **Surface Damage Agreement** with the surface owner. Under that type of agreement, the mineral owner usually pays the surface owner certain set amounts for particular surface uses, such as e.g., drilling pads, roads, and pipelines.

For similar reasons, a Surface Damage Agreement may be appropriate in Louisiana as well.

5. DRILLING OPERATIONS

5.1 Rotary Drilling

Rotating Motion. Assuming you have acquired the minerals or the right to drill for them, the next thing you would want to do is to drill your well or have someone drill it for you. The most common type of drilling is characterized by rotary drilling. In rotary drilling, the power of the bit comes from a rotating motion that turns the bit. The bit spins into the soil, like a carpenter's drill bit. Rotary drilling allows fluid circulation to remove the wellbore cuttings.

Portability. The drilling rigs are portable. They can be constructed on-site (rigged up), and then taken apart (rigged down), and then moved to the next location.

Diesel Engines. The drilling rig in most instances will be accompanied by diesel engines that provide the power to spin the drill string. They also provide power to electrical generators which supply electricity to the rig.

Kelly Pipe and Bushing. The drilling rig either may be "top driven" or the mechanism to drive the spinning of the drill string may exist on the drilling-rig floor. In the latter instance, there is what is called the Kelly bushing on the rig floor, and it engages the Kelly pipe on

the drill string. A Kelly pipe is a four-sided or six-sided "pipe" connected to the draw works on the drilling rig derrick. It slips down through the similarly shaped Kelly bushing which "grips" the Kelly pipe and thus the drill string and is therefore able to spin the drill string.

Circulating Mud. This process ultimately spins the drill bit which breaks up the rock. Drilling mud is circulated through the middle of the drill pipe and out through the drill bit and back up to the surface. The circulation of the drilling mud lifts the rock cuttings to the surface and out of the way. At the surface, the drilling mud is passed through a shale shaker which removes the rock cuttings. After the shale shaker, the mud goes into a pit where it can be used again.

Pipe Joints. The driller will drill down one or two joints of drill pipe at a time. Each drill pipe joint is typically 40 feet long. Once the driller gets to it the end of a joint, the entire string is lifted and then hung off at the rig floor. The Kelly pipe is then unscrewed from the string and a new joint or two of drill pipe are added to the string. The string is then lowered back down so that the drill bit again touches the bottom of the hole. Then the Kelly Pipe is re-engaged with the drill string and the drilling process resumes.

Powerful Process. The process of adding 40-foot pipe joints is repeated until the drill bit reaches the objective depth which might be anywhere from 3,000 feet to 30,000 or more feet below the surface. It is a fascinating and dangerous procedure involving heavy lifting, powerful machinery, fast-moving fluids, and high pressures. It is the kind of process that would make "Tim '*the Tool-Man*' Taylor" enormously proud.

5.2 Drilling Mud

Drilling mud (or "drilling fluid") is usually just like what it sounds - mud. In most cases, it is made up of water, various clays, and chemicals. Drilling fluid has many characteristics and provides many different benefits to the drilling process as will be explained next.

Suspension. The flow of drilling fluid down the drill pipe and up the borehole sometimes stops, either because of a problem, or to add a joint of pipe, or to change the drill bit. When the drilling stops, the rock cuttings in the fluid can sink to the bottom of the hole jamming the drill bit. Drilling fluids are designed to have a remarkably interesting property that takes care of that problem.

The thickness, or viscosity, of the mud increases as movement of the mud slows. When the drilling fluid stops moving, it forms a thick gel that suspends the rock cuttings and keeps them from sinking to the bottom of the borehole. When the fluid starts moving again, it becomes thinner and reverts to its previous thin, liquid form.

Pressure Control. Well blowouts are rare and are no cause for celebration since the goal is to extract the oil and gas in a controlled manner. Drilling mud is designed to prevent such accidents by counteracting the natural pressure of fluids in the rock formation.

A proper balance must be achieved in which the pressure of the drilling fluid against the walls of the borehole is enough to counter the pressure exerted by both rock formations and by oil, gas, or water in the formation, but not so much that it damages the wellbore. If the weight of the drilling fluid is too great, it could cause the formation rock to fracture and

the drilling fluid would be lost into the subsurface formations. If the weight of the drilling fluid is too little, a blowout could occur.

Stabilization of the Exposed Rock Formation. The priority is to keep the exposed rock formation in the borehole stable while avoiding the loss of drilling fluid. If the drilling fluid pressure stays above rock formation pore fluid pressure, there is a natural tendency for the drilling fluid to enter permeable rock in the formation. With special additives in the drilling fluids, such an occurrence can be prevented.

The drilling fluid may sometimes interact with the surrounding rock in other ways: (1) rock laden with salt, or (2) rock formations with a high clay content may tend to be washed away by the fluid. Such formations require an inhibitive fluid to maintain a stable wellbore and prevent enlargement, or washouts.

Buoyancy. A steel drill pipe of such great length weighs many tons. Immersing the drill pipe in fluid produces a buoyancy effect, reducing its weight and putting less stress on the drilling mechanism.

Lubrication and Cooling. When metal moves against rock there is friction and heat. Drilling fluids provide lubrication and cooling to keep the process moving along smoothly, and to extend the life of the drill bit. Lubrication may be especially important on extended reach or horizontal wells where the friction between the drill pipe must be kept to a minimum.

5.3 The Drilling Process

Casing. The first thing the drilling crew will do is dig the cellar hole. Then the crew will drive or pound the "Conductor Pipe" (a large-diameter pipe, usually 16" or 20") into the ground 20' to 50' deep.

Surface Casing. Then they will rig up the drilling rig and install related equipment. Then they will lower the bit and drill pipe into the hole and start drilling. After reaching a certain depth, (usually a depth a little below the depth of fresh water), they will run "Surface" casing (pipe that is smaller in diameter than the conductor pipe) and cement it into place. They will then drill out the cement and continue drilling new hole.

Intermediate Casing. After again reaching a certain depth (depending on how deep the objective depth is), they will then run "Intermediate" casing (pipe that is smaller in diameter than the surface casing) and cement it into place.

Thereafter, they will drill the out cement and continue drilling new hole until the objective depth is reached.

Evaluate. Once objective depth is reached, you will need to evaluate your well. This evaluation usually involves examining drill cuttings and studying well logs, among other things. Creating a well log involves the process of sending energy out into the formation having it bounce back and taking readings. Logging a well is discussed in a little more detail later.

Production Casing. The result of the examination will be a decision on whether to complete the well. If the decision is to complete the well, then the rig crew will run

"Production" casing (pipe that is smaller in diameter than the intermediate casing) and cement it into place. Once the production casing is set in place, the rig crew will then "complete" well. Well completion techniques are discussed later.

The Purpose and Design of Casing. Casing must be run to protect freshwater, keep the wellbore from caving in, contain formation pressures, isolate producing formations, and provide an anchor for surface equipment and artificial lift.

For deeper wells, the drilling crew will often set more than one section of intermediate casing, each such section being slightly smaller in diameter than the one before.

Casing Specifications. Casing must be designed to meet the physical condition imposed on the pipe. A well with 10,000 psi surface pressure requires much heavier casing than a well with 2,000 psi surface pressure. By the same reasoning, the collapse resistance of the casing must be much higher for a string that is to be set at 20,000 feet than a string to be set at 2,000 feet. API has very carefully established specifications for size, grade, weight per foot, type of threaded connections, and length of each joint of casing.

5.4 Evaluating the Well.

Well Logging. Generally, oil and gas operators will use "wireline" logging to obtain information about the formation to which a well has been drilled. Wireline logging is performed by lowering a "logging tool" (or a string of one or more instruments) on the end of a wireline into the well and recording petrophysical properties using a variety of sensors. The process may involve sending energy out into the formation having it bounce back and reading it. It may also involve simply reading or acquiring ambient information.

Logging tools might measure the natural gamma ray, electrical, acoustic, stimulated radioactive responses, electromagnetic, nuclear magnetic resonance, pressure and other properties of the rocks and their contained fluids in the formation.

Multiple Logging Types. No single tool can definitively determine the presence of hydrocarbons in the downhole formation. Open hole logging often requires 10 or more measurements to obtain the desired information. Some types of logs attempt to measure the porosity of the surrounding rock. Examples of such logs are called sonic, density, or neutron.

Determination to Complete the Well. As stated above, the purpose of evaluating the well is to determine whether to complete the well. The logging information will help you to make that determination. Fully completing a well can be expensive. You obviously do not want to spend that kind of money if the formation to which you have drilled likely contains no or little amounts of hydrocarbons.

5.5 Completing the Well.

Perforating the Production Casing. The first step in the process of completing a well is perforating the production casing. There are many different methods for perforating the casing. One method is jet perforating with a shaped charge. The casing and cement and rock are penetrated by high velocity charge of gas formed by the combustion of chemical fuel inside a nozzle. Shaped charges were developed from anti-tank weapons after World War II.
Shaped Charge Explosion. The shaped charge is exploded which sends out a stream of hot gas at high pressure, penetrating through the steel casing, through the cement, and through the formation rock, thereby creating open space.

Area of Low Pressure. Oil and gas production works because a fundamental law of physics, i.e., fluid that is under high pressure will seek out and migrate toward areas of low pressure. What you have done by drilling the well and perforating into the formation, is create an area of low pressure. The oil, gas, and water in the formation is under high pressure. Since the rock in the formation is permeable, the oil gas and water will flow into your well. If the fluid in the formation is under enough pressure, it will flow all the way to the surface. Otherwise, it will fill the well until the pressures balance. In that event, you will have to pump out the fluids.

Completion Treatments. Wells often must be treated to improve the recovery from a reservoir, or to remove barriers within the production formation that prevent easy passage of the fluid into the wellbore. These processes are often used in combination since they frequently help each other.

One such process is fracking, which is discussed above. Another process is called acidizing, i.e., a process of cleaning the formation face to allow fluids to enter the wellbore. A limited amount of dissolving of the formation particles can occur if the acid can be forced far enough into the formation before the acid is expended. Another treatment involves chemicals, e.g., solvents or surfactants.

6. **PRODUCTION OPERATIONS**

6.1 Separation of the Oil and Gas from the Water.

Emulsion. Now that you have successfully drilled your well, it is now time to start producing it. As the oil gas and water flow to the surface (or are pumped up to the surface), the fluid stream comes up as an emulsion.

Salad Dressing. It is similar to a salad dressing made up of oil and vinegar. If you shake up that salad dressing, the oil and vinegar are mixed – the salad dressing is an emulsion. But if you put that bottle of salad dressing on the table, and let it sit, the oil and vinegar will separate from each other.

Separation. Similarly, the oil gas and water are in effect "shaken" as they flow through the formation, the perforations, into the well, and then are pumped (or they flow) to the surface. That oil, gas, and water stream must now be separated into its component parts. For that separation to occur, the stream must sit still for a while. If it does so, the oil will separate from the water (and gas), like the salad dressing bottle sitting on the table.

Vessels or Tanks. Accordingly, oil and gas operators will flow the production stream into a vessel that is called a separator. Separators may be either vertical or horizontal. The size is dependent upon the volume of oil and water to be handled. In either case, once the production stream is flowed to the separator where it will sit for a while, the oil will separate from the water and the gas will separate from both.

Heater Treater. Sometimes the separation process needs a little help. In that case, heat can be applied to the emulsion to help it separate. If a little heat needs to be added to the

process, oil and gas operators will flow the production stream first into a heater treater. A heater treater is like a separator except that the heater treater contains a fire tube in which lease gas is burned to heat the fluids to aid the separation.

6.2 Other Surface Production Facilities.

Initial Production Test. At this point, you have drilled your well, evaluated it, and completed it. Now you will perform a test of your well to determine how much oil, gas, and water it will produce. Once you have done so, you will know what types and the sizes of equipment you will need on the surface of your property to handle that production and prepare it for sale in the market.

At the Wellhead. You will need a wellhead tree at the surface with numerous valves so that you may direct the flow or shut it off. If, as stated before, your well is not under enough pressure that the fluids will flow to the surface on their own, you will need a pump jack or a downhole pump to force the fluids to the surface.

Flow Lines. From the wellhead, you will need flow lines (small-diameter pipe) to move your fluids to your other surface facilities, such as, a separator and/or a heater treater. To help dispose the produced water, you may need a salt-water tank, along with a pump, and a salt-water disposal well to dispose it downhole, or just the tank or vessel to store the produced water temporarily until it can be trucked away.

Tank Battery and LACT Unit. You will also need a vessel or tank (or more than one, if your well is a good producer) to temporarily store your oil until it can be transported via pipeline or trucked to market. If there is an oil transportation pipeline relatively near to your property, you can deliver your oil to market via that pipeline. In that case, you will need to install a Lease Automated Custody Transfer (LACT) Unit at the point at which custody of the oil will be transferred from you, the producer, to the oil transporter. The LACT Unit also contains a meter which will measure the amount of oil that is produced and sold.

VRU. You might also install a Vapor Recovery Unit to capture additional gas that may evaporate from the oil as it sits in the tanks. Plus, since you are producing gas, and gas cannot be stored on site, hopefully there is a nearby gas transportation pipeline into which you will be able to flow your gas to transport it to market. If no such gas transportation pipeline exists nearby, you may need to flare the gas temporarily until one is built. In that case you will need gas flaring equipment on your location.

Gathering Line. Otherwise, you will need a gas flowline or gathering line from your property to the gas transportation pipeline, as well as a gas meter to measure the amount of gas you deliver into that pipeline. In that way, you will know how much gas you were able to produce and sell.

6.3 Agreements.

Transportation and Sale. Some of the agreements you will need at this point are **Sales Agreements**, i.e., separate oil and gas sales agreements so that you may be paid for the oil and gas you produce and sell. You might also need **Transportation Agreements** to move your oil and gas to the markets where you are selling them.

Right to Use the Surface. As stated earlier, you have the right to use as much of the surface estate of the land covered by your oil and gas lease to conduct your operations, i.e., to produce your minerals and to dispose your produced water that come from within the boundaries of your oil and gas lease. See *Sections 4.1 and 4.2* above. And if you are using the land covered by your lease to produce the oil and gas and dispose the water produced only from wells located on your lease, then you will have no need to enter into any further agreements with the person who owns the surface estate. (Recall, however, that it is a customary practice of many oil and gas operators to nevertheless enter into a surface damage agreement with the surface owner as a courtesy.) See *Section 4.2* above.

Consolidated Operations. However, sometimes it makes more sense economically to combine the production from several separate leases. In that way, instead of needing to purchase and install tank batteries and other production and sales equipment on each separate lease, you may be able to save money by consolidating all your production from such separate nearby leases at one surface location.

Off-Lease Operations. If you do so, you will in effect be using the surface estate of that location to serve not only the production coming from the lease where the consolidated tank battery is located, but also the production coming from leases located outside the boundaries of that consolidated-tank-battery lease (called "off-lease production"). You do not have the right to use the surface estate of your leased land to serve off-lease production. See *Robinson v. Robbins Petroleum Corp., Inc.*, 420 S.W.2d 133 (Tex. 1967).

Surface Leases/Agreements. Accordingly, if you desire to save surface-facility costs and consolidate your production at a single tank battery, you will need a **Surface Lease** from the surface owner for the consolidated tank battery. And if you are going to drill a saltwater disposal well nearby to dispose of the consolidated produced water (i.e., water produced off-lease), then you will need a **Salt-Water Disposal Agreement** from the surface owner where the disposal well is located.

7. CONCLUSION

To wrap up, let us assume the following:

- You hired a geologist, who mapped the underground then said, "drill here".
- You obtained the right to do so.
- You hired a driller to drill the well and he drilled it.
- You evaluated your well, determined that it was good, and completed it.
- You bought all of the needed surface equipment and facilities.
- You obtained the additional agreements discussed above.

You will now begin to produce your well and sell the oil and gas. Then, hopefully, the revenue will begin to flow to you like the rain.

So, You Want to Drill Your Own Oil Well – An Oil and Gas Drilling Primer

The 69th Mineral Law Institute at the LSU Law Center

March 31, 2022

Frank N. Cusimano, III



Agenda

- Geology
- Drilling
- Bringing Oil, Gas and Water to the Surface
- Selling the Oil and Gas, Disposing the Water
- Interspersed with the Types of Agreements Needed
- Assumptions
 - Onshore
 - Oil and Gas Well
 - Vertical Well
 - Privately-owned minerals
 - Basic Material (for those already in the industry)

Grateful Acknowledgment to Mr. Berry Simpson for his generosity in sharing his slides

Additional Source: Van Dyke, Kate - *Fundamentals of Petroleum,* Fourth Edition, 1997 Petroleum Extension Service Division of Continuing Education The University of Texas at Austin Austin, TX

So You Want to Drill a Well?

- Where?
- How Deep?
- Geologist will tell you

What Geologists Do

- Collect Data
 - Seismic, Logs, Core Samples, etc.
- Map the Underground
- Study the Maps
 - Likely oil and gas-bearing formations
 - Seals and Traps







Geologist Says... Drill Here

- Need the Right
 - Oil and Gas Lease or Mineral Deed
 - Assignment or Term Assignment
 - Farmout/Farmin Agreement
 - If Co-Owners Joint Operating Agreement
 - Need a Driller
 - Drilling Service Contract
- Surface
 - Surface Damage Agreement or Release





Drilling

Drilling Mud

- Suspension
- Pressure control
- Stabilization
- Buoyancy
- Lubrication & cooling

Drilling Drilling Process

- Conductor pipe
- Rig up
- Start drilling
 - Run surface casing & drill out
 - Run intermediate casing & drill out
 - Evaluate
 - Run production casing
 - Complete well











Surface Facilities

Separation Methods

Vertical Separator

Surface Facilities

Oil Treating

• Heater treater





Agreements

- Sales Agreements (Oil and Gas)
- Transportation Agreements
- Saltwater Disposal Agreement (if disposing off-lease water)
- Surface Lease (if TB serves off-lease production)



SPILL AND EMERGENCY RESPONSE

An Overview of State Agency Relationships, Reporting and Remediation Requirements

By: Jerry Lang Louisiana Department of Environmental Quality

> Gavin Broussard Louisiana Department of Natural Resources

David McCrory Ottinger Hebert, LLC

SPILL AND EMERGENCY RESPONSE

An Overview of State Agency Relationships, Reporting and Remediation Requirements

Part I - Primary Agencies - Authority and Jurisdiction.

To appropriately respond to a spill resulting from the operation of an oil and gas facility, one must necessarily understand what state agencies are involved and each agency's role. Environmental powers have been granted to numerous agencies throughout the State of Louisiana.¹ The authority given these agencies often overlaps, potentially creating confusion and ambiguity as to reporting and remediation requirements, especially in emergencies.

This paper gives the reader a practical overview of the agencies primarily involved in responding to and overseeing remediation of a spill at an onshore oil and gas facility. The paper addresses each agency's history, authority and jurisdiction. The paper discusses each agency's reporting obligations and the remediation standards and methods they require. Finally, the paper provides practical contact information and links to relevant forms in the event of a spill.

The state agencies primarily involved in responding to spills at onshore oil and gas facilities include the Louisiana State Police ("<u>LSP</u>"), the Louisiana Department of Environmental Quality ("<u>DEQ</u>"), and the Louisiana Department of Natural Resources, Office of Conservation ("<u>DNR</u>"). As in most areas of law, the practical application of regulations can differ from the written letter of the law, given the unique circumstances and challenges of each case. As such, we have organized a panel of members from each relevant agency to discuss the practical nuances associated with implementing the applicable statutes and regulations discussed below.

A. State Police

LSP is a statutorily mandated, statewide law enforcement agency.² Louisiana's first attempt at law enforcement on a statewide level came in 1921 in response to the automobile's arrival. Louisiana had 2,700 miles of roadway and an estimated 102,000 vehicles.³ The Louisiana Highway Commission was created and given the power to appoint inspectors to enforce laws relating to the highways.⁴ The Commission operated with the state divided into ten districts; sixteen officers patrolled the entire state.⁵

The Highway Commission evolved into the present-day LSP. Today, LSP comprises over 1,000 men and women responsible for all elements of criminal and highway safety interdiction in

¹ All of the following agencies have jurisdiction and authority over independent and collective aspects of Louisiana's environmental regulatory regime: Louisiana Department of Environmental Quality (LDEQ), the Louisiana Department of Natural Resources (LDNR), the Louisiana Department of Public Safety and Corrections (LDPS&C), the Louisiana Department of Wildlife and Fisheries (LDWF), the Louisiana Department of Agriculture and Forestry (LDAF), the Louisiana Department of Public Safety and Corrections (LDPS&C), and the Louisiana Department of Health and Hospitals (LDHH).
² http://www.lsp.org/about_vision.html

http://www.lsp.org/about_vision.html.

³ http://www.lsp.org/about_hist.html.

⁴ Acts 1921, No. 95.

http://www.lsp.org/about_hist.html.

the state.⁶ Its mission is to ensure the safety of our highways, communities, and environment through enforcement, education, and providing other essential public safety services.⁷

LSP's formal involvement in environmental safety arose in 1979 when the legislature authorized the agency to promulgate rules and regulations and oversee compliance governing the transportation, storage, and manufacturing of hazardous materials within the state.⁸ Today, LSP promulgates and enforces these regulations with guidance from DEQ.⁹

In 1985, the legislature enacted the "Hazardous Materials Information and Response Act."¹⁰ Among other things, LSP was charged with the development and maintenance of a centralized hazardous waste inventory reporting and notification system¹¹ that obligated LSP to do the following:¹²

- 1. Develop rules and regulations governing criteria for defining a substance as a hazardous material and for the development, implementation, compilation, supervision, and management of the information system for hazardous materials;
- 2. Make reasonable efforts to ensure that owners and operators are aware of reporting requirements;
- 3. Supervise the dissemination of data to repositories and train repository personnel to provide information to the public;
- 4. Develop a centralized inventory reporting and notification system allowing for the standardization of reporting on the state, parish, and local government levels. The department, working in conjunction with other state agencies and parish government planning agencies, including local emergency planning committees and local response agencies, will identify the standard content of reporting and develop a centralized state inventory reporting and notification system that can be used by all government agencies; and
- 5. Develop a means to assist all parishes in developing comprehensive hazardous material emergency response plans which reflect local governments' primary responsibility for the protection of local citizens.

The operator of an oil and gas facility is obligated to notify LSP of any reportable releases of a hazardous material or substance exceeding a reportable quantity when that reportable quantity could be reasonably expected to escape the site of the facility, as soon as the owner or operator has

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⁶ http://www.lsp.org/about_hist.html.

⁷ http://www.lsp.org/about_vision.html.

⁸ Acts 1979, No. 83, § 1.

⁹ La. Rev. Stat. Ann. § 30:2189(A); La. Rev. Stat. Ann. § 32:1501.

¹⁰ Acts 1985, No. 435.

¹¹ La. Rev. Stat. Ann. § 30:2361.

¹² La. Rev. Stat. Ann. § 30:2365.

knowledge of such release.¹³ Failure to do so potentially subjects an operator to civil penalties of up to twenty-five thousand dollars for each violation.¹⁴ Additionally, adjudicated penalties may be deducted from any amount the operator owes to the state.¹⁵

To facilitate this function, LSP maintains a "HazMat Hotline" used to report spill incidents within the State of Louisiana.¹⁶ LSP serves as the first point of contact for most emergency spills and is often tasked with notifying other agencies to coordinate response efforts, namely DEQ and DNR.

B. DEQ

In 1983 the Louisiana legislature adopted the "Louisiana Environmental Quality Act," which created the Louisiana Department of Environmental Quality, DEQ.¹⁷ DEQ began formally operating in February 1984. DEQ's mission is to provide service to the people of Louisiana through comprehensive environmental protection in order to promote and protect health, safety and welfare.¹⁸ DEQ serves as the primary agency in the state concerned with environmental protection and regulation.¹⁹

DEQ's mandate to protect the environment and preserve the state's natural resources can be found in La. Rev. Stat. Ann. § 30:2002, wherein the legislature declared:

- 1. The maintenance of a healthful and safe environment for the people of Louisiana is a matter of critical state concern.
- 2. It is necessary and desirable for the protection of the public welfare and property of the people of Louisiana that there be maintained at all times, both now and in the future, clean air and water resources, preservation of the scenic beauty and ecological regimen of certain free flowing streams, and strictly enforced programs for the safe and sanitary disposal of solid waste, for the management of hazardous waste, for the control of hazards due to natural and man-made radiation, considering sound policies regarding employment and economic development in Louisiana.
- 3. It is necessary and essential to the success of the regulatory program that the enforcement procedures include unannounced regular inspections of all regulated facilities.

DEQ has jurisdiction over matters affecting the regulation of the environment within the state, including but not limited to the regulation of air quality, noise pollution control, water

¹³ La. Rev. Stat. Ann. § 30:2373.

¹⁴ La. Rev. Stat. Ann. § 32:1512.

¹⁵ La. Rev. Stat. Ann. § 32:1513.

¹⁶ HazMat Hotline Numbers: 877-925-6595 or 225-925-6595.

¹⁷ Acts 1983, No. 97, §1, eff. Feb. 1, 1984.

¹⁸ <u>https://www.deq.louisiana.gov/subhome/about-ldeq.</u>

La. Rev. Stat. Ann. § 30:2011.

pollution control, the regulation of solid waste disposal, the protection and preservation of the scenic rivers and streams of the state, the regulation and control of radiation, the management of hazardous waste, and the regulation of those programs which encourage, assist, and result in the reduction of wastes generated within Louisiana.²⁰

Under the Louisiana Environmental Control Act, DEQ has authority to enforce applicable regulations by bringing a civil suit for damages, issuing compliance orders, and issuing civil and criminal penalties.²¹ Additionally, upon receipt of evidence of an incident that is of such magnitude as to require immediate action to prevent irreparable damage to the environment or a serious threat to life or safety, the Secretary of DEQ may declare that an emergency exists.²² When an emergency situation is declared, the secretary is authorized to undertake the containment and abatement of the pollution source and pollutants and may retain personnel for these purposes who shall operate under his direction.²³ DEQ may also seek reimbursement for any emergency abatement and/or cleanup costs it incurs by any method provided by law.²⁴

C. DNR

The Louisiana Department of Conservation was formally created in 1916 and came under the control of a single officer entitled the "Commissioner of Conservation."²⁵ In 1924, the legislature made it illegal to pollute the natural waterways of the state with salt water, oil, and other substances.²⁶ This appears to be the first recorded incidence of environmental action taken on the oil industry by the legislature.

During the reorganization of Louisiana State Government in 1976, the legislature created the Louisiana Department of Natural Resources, DNR, and made it "responsible for the conservation, management, and development of water, minerals, and other such natural resources of the state, including coastal management, except timber and fish and wildlife and their habitats."²⁷ Among other things, DNR was tasked with promoting and encouraging the "exploration, production, and refining efforts for oil, intrastate gas, and other hydrocarbons; the control and allocation of energy supplies and distribution; the lease or construction and operation of intrastate pipeline systems."²⁸

During this same period, the Department of Conservation was transferred to and remains within DNR.²⁹ The Office of Conservation continues to be directed and controlled by a Commissioner of Conservation (the "<u>Commissioner</u>"), who is appointed by the governor, with the

²⁰ La. Rev. Stat. Ann. § 30:2011.

²¹ La. Rev. Stat. Ann. § 30:2025(B), (D) and (F).

²² La. Rev. Stat. Ann. § 30:2033; 33 LAC Pt I, § 6913.

²³ La. Rev. Stat. Ann. § 30:2033; 33 LAC Pt I, § 6913.

²⁴ La. Rev. Stat. Ann. § 30:2033; 33 LAC Pt I, § 6913.

²⁵ http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=50&pnid=0&nid=35

²⁶ Acts 1924, No. 133.

²⁷ Acts 1977, No. 83; La. Rev. Stat. Ann. § 36:351.

²⁸ La. Rev. Stat. Ann. § 36:358.

²⁹ La. Rev. Stat. Ann. § 36:359.

consent of the Senate, for a term of four years.³⁰ In the exercise of his or her power, the Commissioner has the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books, and records; to examine, survey, check, test, and gauge oil and gas wells, tanks, refineries, and modes of transportation; to hold hearings; to provide for the keeping of records and the making of reports; to require the submission of an emergency phone number by which the operator may be contacted in case of an emergency; and to take any action as reasonably appears to the Commissioner to be necessary to enforce his or her authority.³¹

Under La. Rev. Stat. Ann. § 30:18, the Commissioner also has authority to enforce applicable regulations by issuing compliance orders and civil penalties up to five thousand dollars a day for each violation.³²

Part II - Notice.

Having reviewed the authority and powers of the primary state agencies involve in responding to a spill incident, we next look at the applicable reporting requirements.

A. Initial Report

An "unauthorized discharge" is defined as "a continuous, intermittent, or one-time discharge, whether intentional or unintentional, anticipated or unanticipated, from any permitted or unpermitted source which is in contravention of any provision of the Louisiana Environmental Quality Act (R.S. 30:2001, *et seq.*) or of any permit or license term/ condition, or of any applicable regulation, compliance schedule, variance, or exception of the administrative authority."³³

How an unauthorized discharge is to be reported depends on whether it is characterized as an "emergency" (regardless of the amount of the discharge) or a "non-emergency" which exceeds a reportable quantity. A list of reportable quantity thresholds is set forth in 33 LAC Pt I, § 3927. For example, in the oil and gas context, the spill of more than a barrel of oil or produced water is considered a reportable quantity. An "emergency condition" is defined as "any condition which could reasonably be expected to endanger the health and safety of the public, cause significant adverse impact to the land, water or air environment, or cause severe property damage."³⁴

In the event of an unauthorized discharge that does cause an emergency condition, the discharger must notify LSP at (225) 925-6595 (collect calls accepted 24 hours a day) immediately (a reasonable period of time after taking prompt measures to determine the nature, quantity, and potential off-site impact of a release, considering the exigency of the circumstances), but in no case later than one hour after learning of the discharge.³⁵ One notification to the hotline for any unauthorized discharge suffices for unauthorized discharges that continue for more than one day

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³⁰ La. Rev. Stat. Ann. § 30:1.

³¹ La. Rev. Stat. Ann. § 30:4.

³² La. Rev. Stat. Ann. § 30:2025(B), (D) and (F).

³³ La. Admin Code § 33:I.3905.

³⁴ La. Admin Code § 33:I.3905.

⁵ La. Admin Code § 33:I.3915.

if the initial notification clearly states that the discharge is expected to continue for more than one day.³⁶ LSP will notify DEQ and DNR of the emergency discharge.

If an unauthorized discharge exceeds a reportable quantity but does not cause an emergency condition, the discharger shall promptly notify LSP by telephone at (225) 925-6595 within 24 hours after learning of the discharge.³⁷ LSP will notify DEQ and DNR of the non-emergency discharge.

All other required notifications must be provided to DEQ within 24 hours, or as prescribed by the specific regulation or permit provision requiring the notification, and shall be given through DEQ's single point of contact ("<u>SPOC</u>"), as follows:³⁸

- 1. by the online incident reporting screens found at <u>https://internet.deq.louisiana.gov/portal/ONLINESERVICES/FORMS/INCIDENT-</u> <u>REPORTING-SPILL-INCIDENT-RELEASE;</u>
- 2. by e-mail to SPOC@la.gov;
- 3. by telephone at (225) 219-3640 during office hours, or at (225) 342-1234 after hours and on weekends and holidays; or
- 4. for radiation incidents, by telephone at (225) 765-0160.

B. Seven Day Report

Within seven calendar days after making the initial notifications above, any responsible party must also provide DEQ with a written report known as a "<u>Seven Day Report</u>." A Seven Day Report must include the following information:³⁹

- 1. the name, address, telephone number, agency interest number (number assigned by the department) if applicable, and any other applicable identification numbers of the person, company, or other party who is filing the written report;
- 2. the time and date of prompt notification, the state official contacted when reporting, the name of the person making that notification, identification of the site or facility, vessel, transport vehicle, or storage area from which the unauthorized discharge occurred, and the location where the incident occurred;
- 3. date(s), time(s), and duration of the unauthorized discharge and, if not corrected, the anticipated time it is expected to continue;

³⁶ La. Admin Code § 33:I.3915.

³⁷ La. Admin Code § 33:I.3917.

³⁸ La. Admin Code § 33:I.3923.

³⁹ La. Admin Code § 33:I.3925.

- 4. details of the circumstances (unauthorized discharge description and root cause) and events leading to any unauthorized discharge, including incidents of loss of sources of radiation, and if the release point is subject to a permit:
 - a. the current permitted limit for the pollutant(s) released;
 - b. the permitted release point/outfall ID; and
 - c. which limits were exceeded (SO2 limit, mass emission limit, opacity limit, etc.) for air releases;
- 5. the common or scientific chemical name of each specific pollutant that was released as the result of an unauthorized discharge, including the CAS number and U.S. Department of Transportation hazard classification, and the best estimate of amounts of any or all released pollutants (total amount of each compound expressed in pounds, including calculations);
- 6. a statement of the actual or probable fate or disposition of the pollutant or source of radiation and what off-site impact resulted;
- 7. remedial actions taken, or to be taken, to stop unauthorized discharges or to recover pollutants or sources of radiation;
- 8. procedures or measures which have or will be adopted to prevent recurrence of the incident or similar incidents, including incidents of loss of sources of radiation;
- 9. if an unpermitted or unlicensed site or facility is involved in the unauthorized discharge, a schedule for submitting a permit or license application to the department, or rationale for not requiring a permit or license;
- 10. the reporting party's status (former or present owner, operator, disposer, etc.);
- 11. for discharges to the ground or groundwater, the following information shall also be included: all information of which the reporting party is aware that indicates pollutants are migrating, including, but not limited to, monitoring well data; possible routes of migrations; and all information of which the reporting party is aware regarding any public or private wells in the area of the migration used for drinking, stock watering, or irrigation;
- 12. what other agencies were notified;
- 13. the names of all other responsible parties of which the reporting party is aware;
- 14. a determination by the discharger of whether or not the discharge was preventable, or if not, an explanation of why the discharge was not preventable;
- 15. the extent of injuries, if any; and

16. the estimated quantity, identification, and disposition of recovered materials, if any.

Seven Day Reports can be submitted to DEQ by e-mail at <u>writtennotificationLDEQ@la.gov</u> with the caption "UNAUTHORIZED DISCHARGE NOTIFICATION REPORT" or mailed to the following address:

Louisiana Department of Environmental Quality Post Office Box 4312 Baton Rouge, LA 70821-4312 ATTENTION: Office of Environmental Compliance – SPOC "UNAUTHORIZED DISCHARGE NOTIFICATION REPORT

A "Seven Day Report" is also required in the event that any unauthorized discharge results in the contamination of the groundwaters of the state or otherwise moves in, into, within, or on any saturated subsurface strata.⁴⁰ "Groundwater" is defined as water located beneath the ground surface or below a surface water body in a saturated zone or stratum.⁴¹ "Groundwater Contamination" is defined as the degradation of naturally occurring groundwater quality either directly or indirectly as a result of human activities.⁴²

In addition to the reporting requirements above, DNR regulations state that the unpermitted or unauthorized onsite or offsite storage, treatment, disposal or discharge of exploration and production waste is prohibited.⁴³ Any spills which occur during the offsite transportation of exploration and production waste must be reported by phone to the Office of Conservation, within 24 hours of the spill and the appropriate state and federal agencies.⁴⁴ Operators (generators) are required to report the discovery of any unauthorized disposal of exploration and production waste by transporters, or any other oilfield contracting company.⁴⁵ An unauthorized discharge or disposal of E&P waste is reported to LDNR on the ENG-15c Form.

The next part will discuss some of the regulatory remediation standards enforced by DNR and DEQ.

Part III - Remediation Standards.

A. 29B

In addressing a spill incident, DNR uses what is often referred to as "Statewide Order 29-B Standards" or "29B Standards." Statewide Order 29-B was originally codified in Louisiana Administrative Code, Title 43:XIX as § 129. In December 2000, § 129 was restructured into

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⁴⁰ La. Admin Code § 33:I.3919.

⁴¹ La. Admin Code § 33:I.3905.

⁴² La. Admin Code § 33:I.3905.

⁴³ La. Admin Code § 43:XIX.503B.

⁴⁴ La. Admin Code § 43:XIX.503.H.1.

⁴⁵ La. Admin Code § 43:XIX.503.H.2.

Chapters 3, 4 and 5. Chapter 3 contains the oilfield pit regulations most applicable to any onsite spill response.⁴⁶

29B Standards were primarily adopted to address the remediation of pits used in historic oil and gas operations before 1986. La. Admin Code § 43:XIX.305 prohibits the use of pits constructed before January 20, 1986 unless an operator notifies the Office of Conservation of detailed information regarding the pit as well as a plan and schedule for abandonment and closure. Operators must notify the Office of Conservation of the intent to construct new pits, except for reserve pits, within 10 days prior to the beginning of construction.⁴⁷ For reserve pits used in drilling and workover operations, notification requirements are satisfied by application for a drilling or work permit.⁴⁸ The required notification of the intent to construct reserve pits is satisfied by the application for a drilling or a work permit. Notice of closure or new or reserve pits must be submitted to the Office of Conservation in writing on the ENG-15 Form, including the name of the facility pit; field designation; section, township and range; parish; type of pit; size of pit; type of liner; and certification that the pit complies with Statewide Order No. 29-B regulations.⁴⁹

An unauthorized discharge or disposal of E&P waste is reported to LDNR on the ENG-15c Form. DNR uses the pit closure standards set forth in La. Admin Code § 43:XIX.311 as the basis for remediating any unauthorized onsite discharge.

29B Standards are intended to "assure protection of soil, surface water, groundwater aquifers and USDW's."⁵⁰ The specific standards to be used by an operator are based on the site setting and closure approach.⁵¹ Subject to DNR's approval and oversight, operators may remediate a spill by using various methods, including "onsite land treatment, burial, solidification, onsite land development, or other techniques approved by the Office of Conservation only if done so in compliance with § 313 and § 315."⁵²

Except for solidification, waste/soil mixtures must not exceed the following criteria:53

- 1. range of pH: 6-9 for land treatment and burial and trenching, 6-12 for onsite land development;
- 2. total metals content (ppm):

Parameter	Limitation
Arsenic	10

⁴⁶ La. Admin Code § 43:XIX, Subpt. 1, Ch. 3, Refs & Annos.

La. Admin Code § 43:XIX.305B.

⁴⁸ La. Admin Code § 43:XIX.305C.

⁴⁹ La. Admin Code § 43:XIX.305D.

⁵⁰ La. Admin Code § 43:XIX.311A.

⁵¹ La. Admin Code § 43:XIX.313.

⁵² La. Admin Code § 43:XIX.311A.

⁵³ La. Admin Code § 43:XIX.313C.

Barium-	20,000
Submerged wetland	
Barium- Elevated	20,000
wetland	
Barium- Upland	40,000
Cadmium	10
Chromium	500
Lead	500
Mercury	10
Selenium	10
Silver	200
Zinc	500

Land Treatment:

In addition to the pH and metals criteria listed above, land treatment of exploration and production wastes in submerged wetland, elevated wetland, and upland areas is permitted if the oil and grease content of the waste/soil mixture after closure is < 1 percent (dry weight).⁵⁴

Additional parameters for land treatment of exploration and production waste in elevated, freshwater wetland areas where the disposal site is not normally inundated are as follows:⁵⁵

Parameter	Limitation
electrical	< 8 mmhos/cm
conductivity (EC-	
solution phase)	
sodium adsorption	< 14
ratio (SAR-solution	
phase)	
exchangeable	< 25 percent
sodium percentage	
(ESP-solid phase)	

Additional parameters for land treatment of exploration and production waste in upland areas are as follows:⁵⁶

Parameter	Limitation
electrical	< 4 mmhos/cm
conductivity (EC-	
solution phase)	

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⁵⁴ La. Admin Code § 43:XIX.313D.1.

⁵⁵ La. Admin Code § 43:XIX.313D.2.

⁵⁶ La. Admin Code § 43:XIX.313D.3.

sodium adsorption	< 12
ratio (SAR-solution	
phase)	
exchangeable	< 15 percent
sodium percentage	
(ESP-solid phase)	

Burial or Trenching:

Pits containing exploration and production waste may be closed by mixing the waste with soil and burying the mixture onsite, provided the material to be buried meets the following criteria:⁵⁷

- 1. the pH and metals criteria in § 313.C above;
- 2. moisture content: < 50 percent by weight;
- 3. electrical conductivity (EC): < 12 mmhos/cm;
- 4. oil and grease content: < 3 percent by weight;
- 5. top of buried mixture must be at least 5 feet below ground level and then covered with 5 feet of native soil;
- 6. bottom of burial cell must be at least 5 feet above the seasonal high-water table.

Solidification:

Pits containing exploration and production waste may be closed by solidifying wastes and burying it onsite provided the material to be buried meets the following criteria: ⁵⁸

1. pH range: 6 - 12;

La. Admin Code § 43:XIX.313E.

La. Admin Code § 43:XIX.313F.

- 2. Leachate testing for oil and grease: < 10.0 mg/1 and chlorides < 500.0 mg/1
- 3. Leachate testing for the following metals:

Parameter	Limitation
arsenic	< 0.5 mg/1
barium	< 10.0 mg/l
cadmium	< 0.1 mg/1
chromium	< 0.5 mg/1
lead	< 0.5 mg/1
mercury	< 0.02 mg/1
selenium	< 0.1 mg/1
silver	< 0.5 mg/l
zinc	< 5.0 mg/1

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- 4. top of buried mixture must be at least 5 feet below ground level and covered with 5 feet of native soil;
- 5. bottom of burial cell must be at least 5 feet above the seasonal high water table;
- 6. solidified material must meet the following criteria:

Criteria	Limitation
arsenic	> 20 lbs/in2 (psi)
permeability	<1 x 10-6 cm/sec
wet/dry durability	> 10 cycles to
	failure

Onsite Land Development:

Exploration and production waste may also be closed under certain circumstances by processing the waste material with DEQ approved stabilizing additives and using the mixture onsite to develop lease roads, drilling and production locations, etc. provided the following conditions have been met:⁵⁹

- 1. at least 72 hours prior to commencement of waste processing operations, written notification has been made to the Office of Conservation of the operator's intent to utilize this method of reserve pit closure. This notification shall include a detailed explanation of the methods used to generate the processed waste material, including but not limited to the types and volumes of additives to be used, amounts of processed waste material to be generated, the applications and locations onsite for which the processed waste material will be used, written approval from the surface owner of the property on which the processed waste material is to be applied; and any other pertinent information required by the commissioner;
- 2. E&P waste shall not be processed in an unlined reserve pit with a bottom that extends to a depth deeper than 5 feet above the seasonal high water table;
- 3. the processed waste material meets the following analytical criteria:
 - a. pH range of the mixture: 6-12;
 - b. electrical conductivity (EC): < 8 mmhos/cm;
 - c. oil and grease content: < 1 percent by weight;
 - d. total metals content meeting the criteria of § 313.C.2 above;
 - e. leachate testing for chloride concentration: < 500 mg/L; and,
 - f. NORM concentrations do not exceed applicable DEQ criteria or limits;

⁵⁹ La. Admin Code § 43:XIX.313G.

- 4. any pit remaining after the generation and application of the processed waste material shall be closed in conformance with the criteria of § 313.D above; and
- 5. the Commissioner of Conservation, the Secretary of the Department of Natural Resources, and the State of Louisiana shall be held harmless from and indemnified for any and all liabilities arising from onsite land development using processed E&P Waste, and the operator of record and the surface owner shall execute agreements as the commissioner requires for this purpose.

Passive Closure:

Finally, the Office of Conservation will also consider requests for passive pit closure where (1) pit closure would create a greater adverse environmental impact than if the pit were allowed to remain unreclaimed; or (2) where pit usage can be justified for agricultural purposes or wildlife/ecological management.⁶⁰ Operators requesting passive closure must submit a written request to the Office of Conservation that contains:⁶¹

- 1. An affidavit from the operator stating the reason that passive closure is being requested;
- 2. ENG-15 or ENG-15-CP with pit identification number shown thereon;
- 3. an affidavit of no objection from the Louisiana Department of Wildlife and Fisheries;
- 4. where applicable, an affidavit of no objection from the Department of Natural Resources, Coastal Management Division;
- 5. an affidavit of no objection from the landowner endorsing operator's request for passive pit closure;
- 6. a photograph of the pit in question;
- 7. an inspection of the pit signed by a conservation enforcement agent and a representative of the operator. The operator shall contact the applicable conservation district office to arrange date and time for inspection;
- 8. analytical laboratory reports of the pit bottoms and pit levees indicating conformance with applicable land treatment criteria set forth in § 313.C and D;
- 9. an analytical laboratory report of the fluid contents of the pit indicating conformance with applicable state and federal effluent guidelines for oil and gas exploration and production. Contact the Department of Environmental

La. Admin Code § 43:XIX.313H.1.

⁶¹ La. Admin Code § 43:XIX.313H.2.

Quality, Office of Environmental Services, (225) 219-3181 for information regarding effluent limitations.

The Commissioner of Conservation retains the right to grant exceptions to the above requirements as he deems appropriate. Finally, E&P waste may be disposed of offsite at an appropriately approved commercial facility.⁶²

B. RECAP

DEQ typically uses what is referred to as "RECAP" standards when responding to a reportable spill. The Louisiana Legislature mandated in La. R.S. 30:2272 (Act 1092 of the 1995 Regular Session) that DEQ develop minimum remediation standards.⁶³ In response to that mandate, DEQ developed the October 20, 2003 Louisiana Department of Environmental Quality's Risk Evaluation/Correction Action Program ("<u>RECAP</u>") which is adopted by reference in 33 LAC Pt I, § 1307. The RECAP Program consists of a tiered framework composed of a limiting screening option and three Management Options (MO-1, MO-2, and MO-3).⁶⁴ This tiered approach allows site evaluation and corrective action efforts to be tailored to site conditions and risks.⁶⁵ As the management option level increases, the approach becomes more site-specific.⁶⁶ All management options under DEQ's RECAP achieve a common goal: protection of human health and the environment.⁶⁷

The screening option provides DEQ-derived screening standards for soil and groundwater for non-industrial (residential) and industrial land-use scenarios.⁶⁸ The screening standards represent constituent concentrations in media that protect human health and the environment. ⁶⁹ The screening standards may be used to: ⁷⁰

- 1. demonstrate an area of concern does not pose a threat to human health or the environment and, hence, does not require further action at this time;
- 2. identify the area of interest and constituent of concern for management of an area of concern under the screening option; or
- 3. determine if an area of concern warrants further evaluation under RECAP.

⁷⁰ Id.

⁶² La Admin Code § 43:XIX.313I

⁶³ October 20, 2003 Louisiana Department of Environmental Quality's Risk Evaluation/Correction Action Program, Preamble.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

To screen an area of concern, the maximum concentration detected for each constituent in soil and groundwater must be compared to the limiting screening standards.⁷¹ The maximum concentration used in the screening process shall represent the most heavily impacted area(s) known or suspected to be present within the area of concern.⁷² Identification of the most heavily impacted area(s) is subject to concurrence by the DEQ.⁷³ A copy of the screening standards can be found in Table 1.

If the maximum constituent concentration(s) detected at the area of concern is less than or equal to the limiting screening standard, no further action is typically required.⁷⁴ If the maximum constituent concentration(s) detected in soil and/or groundwater at the area of concern exceeds the screening standard, then: (1) the area of interest must be managed under the screening option; or (2) the area of interest must be evaluated under MO-1, MO-2, or MO-3.⁷⁵

MO-1 provides DEQ-derived RECAP Standards for soil and groundwater.⁷⁶ The MO-1 standards represent constituent concentrations in media that are protective of human health and the environment.⁷⁷ The MO-1 standards were derived for non-industrial (residential) and industrial land use scenarios using currently recommended default exposure parameters and toxicity criteria issued by the EPA. MO-1 may be used to:⁷⁸

- 1. document that an area of interest does not pose a threat to human health or the environment and hence, does not warrant further action at this time;
- 2. expeditiously manage an area of interest defined by the presence of low constituent concentrations and standard exposure conditions; and/or
- 3. identify areas of a facility, media, or constituent of concern that warrant further evaluation so that the scope of the MO-2 or MO-3 evaluation can be limited to those areas/media/constituents most likely to pose a risk.

The soil area of interest concentration and/or groundwater compliance concentration must be compared to the MO-1 limiting RECAP standards.⁷⁹ A copy of the MO-1standards for soil can be found in Table 2.

- ⁷⁵ Id.
- ⁷⁶ Id. at. pp. 2-3.
- ⁷⁷ Id.
- ⁷⁸ Id.

Spill and Emergency

⁷⁹ Id.

⁷¹ Id.

⁷² Id. ⁷³ Id.

 ⁷³ Id.
 ⁷⁴ Id.

If the MO-1 standards are met, then typically, no further action is required.⁸⁰ If the MO-1 standards are exceeded, then the operator can remediate the site in accordance with the MO-1 standards and closure requirements or proceed an MO-2 or MO-3 evaluation.⁸¹

MO- 2 provides for the development of soil and groundwater RECAP standards using sitespecific data with specified analytical models to evaluate constituent fate and transport at the area of interest.⁸² The results of this site-specific evaluation must be used in conjunction with currently recommended default exposure assumptions and toxicity criteria to identify site-specific MO-2 RECAP standards.⁸³ These standards represent constituent concentrations in media that are protective of human health and the environment under site-specific conditions.⁸⁴ Site-specific data to be used in the evaluation include:⁸⁵

- 1. Historical information related to the release;
- 2. Site investigation data and supporting quality assurance/quality control data;
- 3. Geology, hydrology, and hydrogeology of the area of interest;
- 4. Identification of constituents of concern and media impacted;
- 5. Distribution of the constituent concentrations present within the area of interest;
- 6. Maximum or 95% upper confidence limit constituent concentration in soil;
- 7. Sample quantitation limit for non-detect results;
- 8. Horizontal and vertical boundaries of the area of interest;
- 9. Site-specific environmental fate and transport data which may include area (acres) of impacted soil, dry soil bulk density, water-filled soil porosity, soil particle density, and fractional organic carbon in soil;
- 10. Groundwater classification of the zone of concern based on aquifer yield or total dissolved solids; location, depth, and use of groundwater wells within a 1-mile radius; thickness of the groundwater plume (Sd); compliance concentration at the point of compliance; point of exposure; distance to the nearest downgradient property boundary (if applicable); designated use of, and distance to, the nearest downgradient surface water body (if applicable);

11. Area (acres) of impacted soil;

⁸⁰ Id.

⁸¹ Id.

⁸² Id. at. p. 3.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id. at pp. 92-93.

- 12. Distribution of the compliance concentrations present within the area of interest;
- 13. Synthetic Precipitation Leaching Procedure data (optional);
- 14. Critical effects/target organs for each compliance concentration that elicits noncarcinogenic health effects;
- 15. Receptors and exposure pathways associated with current and future land use; and
- 16. Environmental fate and transport pathways for constituent migration.

The soil area of investigation concentration and/or groundwater compliance concentration must be compared to the site-specific MO-2 limiting RS.⁸⁶ If the soil AOIC and groundwater CC for all COC are less than or equal to the site-specific MO-2 limiting Recap Standard, then typically, no further action is required for soil or groundwater.⁸⁷ If a constituent-specific soil area of investigation concentrations and/or groundwater compliance concentrations exceed a MO-2 limiting RECAP Standard, the Submitter may: (1) remediate to the MO-2 limiting RECAP Standard and comply with closure requirements for MO-2; or (2) proceed with a MO-3 evaluation.⁸⁸

Management Option 3 provides for the development of site-specific Recap Standards for all impacted media using site-specific exposure and environmental fate and transport data.⁸⁹ The site- specific MO-3 limiting RECAP Standards represent constituent concentrations in media that are protective of human health and the environment under site-specific conditions.⁹⁰ The area of investigation concentration and/or groundwater compliance concentration shall be compared to the site-specific MO-3 RECAP Standards.⁹¹ If the area of investigation concentrations and/or groundwater compliance concentrations detected at the area of investigation are less than or equal to the MO-3 limiting RECAP Standards, then typically, no further action is required. If a constituent-specific area of investigation concentration and/or groundwater compliance concentration for a constituent of concern exceeds a MO-3 limiting RECAP Standard, then: (1) the area of investigation shall be remediated to the MO-3 RECAP Standards (2) confirmatory sampling shall be conducted; and (3) closure and/or post-closure requirements shall be met. In general, MO-3 requires additional site evaluation, a more extensive exposure assessment, and the application of more sophisticated fate and transport models.⁹² However, it should be noted that the complexity and scope of MO-3 are dictated by the complexity of the area of investigation

⁸⁸ Id.

- ⁹⁰ Id.
- ⁹¹ Id.
- ⁹² Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁹ Id. at. pp. 3-4.

conditions and exposure scenarios. ⁹³ A copy of the MO-1, 2 and 3 standards for groundwater can be found in Table 3.

Part IV - <u>Conclusion</u>.

Dealing with rules and regulations from multiple agencies while responding to a spill event can often be confusing. Having a general understanding of each agency's authority and jurisdiction, reporting requirements and remediation standards goes a long way towards developing an effective response to any spill event. When in doubt, contact LSP, DEQ and/or DNR with questions and keep an open line of communication until the spill event is resolved.
REGULATORY CONTACTS

Louisiana Department of Environmental Quality (DEQ)

602 N. Fifth Street Baton Rouge, Louisiana 70802

Main Line: (225) 219-5337 Emergency Line: (225) 342-1234 Single Point of Contact (SPOC): (225) 219-3640 Radiation Services: 225-765-0160 Water Pollution Control: (225)765-0634

Website: https://www.deq.louisiana.gov Email: writtennotificationLDEQ@la.gov OnlineReporting:https://internet.deq.louisiana.gov/p ortal/ONLINESERVICES/FORMS/INCIDENT-REPORTING-SPILL-INCIDENT-RELEASE

Louisiana Department of Natural Resources (LDNR) – Office of Conservation

617 North Third Street, Baton Rouge, LA 70802

Main Line: (225) 342-8244 Hazardous Material: (225) 925-6595 Oilfield Incident: (225) 342-5540 Oilfield Waste/Injection Wells: (225) 342-5515 Pipelines: (225) 342-5505

Website: <u>http://dnr.louisiana.gov/</u> SONRIS Website: <u>http://sonris.com/</u>

Email: <u>oocinfo@la.gov</u> Reporting form: <u>http://www.dnr.louisiana.gov/assets/OC/eng_div/eng_15c.pdf</u>

Louisiana Department of Wildlife and Fisheries (LDWF)

Address: 2000 Quail Drive, Baton Rouge, LA 70808 Main Line: (225) 765-2800 Violation Reporting: (800) 442-2511 Oiled Wildlife Reporting: (866) 557-1401 Well site development on WMAs: (225) 765-2819 Website: http://www.wlf.louisiana.gov/

Louisiana Department of Transportation (LDOT)

Address: 1201 Capitol Access Road, Baton Rouge, LA 70802 Customer Service: (877) 452-3683 Environmental Section: (225) 242-4502 Website:

http://wwwsp.dotd.la.gov/Pages/default.aspx Email: dotdcs@la.gov Louisiana State Police (LSP)

7919 Independence Blvd. Baton Rouge, LA 70806

Headquarters Main Line: (225) 925-6006 HazMat Hotline: (877) 925-6595

Website: <u>www.lsp.org</u> Email: <u>lspweb@dps.la.gov</u>

Local Emergency Planning Committees Contacts: http://www.lsp.org/pdf/rtk_lepcphone.pdf

Louisiana Department of Public Safety and Corrections (LDPS) Oil Spill Coordinator's Office 290 E. Airport Drive, Suite C, Baton Rouge, LA 70806 Main Line: (225) 925-6606 Website: http://www.losco.state.la.us/

Louisiana Poison Control Center (LPCC)

Address: 1455 Wilkinson Street, Shreveport, LA 71130

Emergency Line: (800) 222-1222 Website: www.aapc.org Email: info@aapcc.org

Environmental Protection Agency (EPA) – General Contact

Region VI Address: 1445 Ross Avenue, Suite 1200, Dallas, TX 75202 Region VI Main Line: (214) 665-2200

Website: http://www.epa.gov/

U.S. Army Corps of Engineers,

New Orleans District, Operations Division, Regulatory Branch, P.O. Box 60267 New Orleans, Louisiana 70160 Main Line: (504) 862-2201 Website: www.mvn.usace.army.mil/index.asp

U.S. Department of Labor - Occupational Safety & Health Administration (OSHA)

Region VI Address: 525 Griffin Street, Suite 602, Dallas, Texas 75202 Emergency Line: (800) 321-6742

Region VI Main Line: (972) 850-4145

Website: www.osha.gov/index.html

Email Link: http://www.osha.gov/ecor_form.html

Online Reporting:

http://www.osha.gov/pls/osha7/eComplaintForm.ht ml

Online Reporting: <u>https://echo.epa.gov/report-</u> environmental-violations

National Response Center (NRC)

Address: 2100 2nd Street, SW, Washington, DC 20593-0001 Emergency Line: (800) 424-8802 Direct Line: (202) 267-2675 Website: www.nrc.uscg.mil Email: HQS-DG-lst-nrcweb@uscg.mil Online Reporting: http://www.nrc.uscg.mil/apex/f?p=201:2:44937964613260 66::NO:::

		SOIL SSni		SOIL SSI		SOIL SSGW		GW SS	
COMPOUND	CAS #	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/L)	NOTE
Acenaphthene	83-32-9	3.7E+02	z	6.1E+03	z	2.2E+02	۷	3.7E-02	z
Acenaphthylene	208-96-8	3.5E+02	z	5.1E+03	z	8.8E+01	۷	1.0E-01	σ
Acetone	67-64-1	1.7E+02	z	1.4E+03	z	1.5E+00	A	1.0E-01	σ
Aldrin	309-00-2	2.8E-02	υ	1.3E-01	υ	1.1E+01	۷	1.9E-03	σ
Aniline	62-53-3	2.4E+00	z	1.7E+01	z	6.5E-02	A	1.2E-02	ပ
Anthracene	120-12-7	2.2E+03	z	4.8E+04	z	1.2E+02	A	4.3E-02	×
Antimony	7440-36-0	3.1E+00	z	8.2E+01	z	1.2E+01	L1	6.0E-03	MCL
Arsenic	7440-38-2	1.2E+01	۵	1.2E+01	۵	1.0E+02	_	1.0E-02	MCL
Barium	7440-39-3	5.5E+02	z	1.4E+04	z	2.0E+03	_	2.0E+00	MCL
Benzene	71-43-2	1.5E+00	v	3.1E+00	v	5.1E-02	A	5.0E-03	MCL
Benz(a)anthracene	56-55-3	6.2E-01	υ	2.9E+00	ပ	3.3E+02	۷	7.8E-03	σ
Benzo(a)pyrene	50-32-8	3.3E-01	Ø	3.3E-01	Ø	2.3E+01	A	2.0E-04	MCL
Benzo(b)fluoranthene	205-99-2	6.2E-01	υ	2.9E+00	ပ	2.2E+02	۷	4.8E-03	σ
Benzo(k)fluoranthene	207-08-9	6.2E+00	ပ	2.9E+01	ပ	1.2E+02	۷	2.5E-03	σ
Beryllium	7440-41-7	1.6E+01	z	4.1E+02	z	8.0E+00	L1	4.0E-03	MCL
Biphenyl,1,1-	92-52-4	2.3E+02	Ч	2.3E+02	Ч	1.9E+02	۷	3.0E-02	z
Bis(2-chloroethyl)ether	111-44-4	3.3E-01	Ø	1.1E+00	c	3.3E-01	Ø	5.7E-03	Ø
Bis(2-chloroisopropyl)ether	108-60-1	4.9E+00	U	1.7E+01	U	8.0E-01	Ø	5.7E-03	Ø
Bis(2-ethyl-hexyl)phthalate	117-81-7	3.5E+01	c	1.7E+02	c	7.9E+01	A	6.0E-03	MCL
Bromodichloromethane	75-27-4	1.8E+00	c	4.2E+00	c	9.2E-01	A	1.0E-01	MCL
Bromoform	75-25-2	4.8E+01	ပ	1.8E+02	ပ	1.8E+00	۷	1.0E-01	MCL
Bromomethane	74-83-9	4.3E-01	z	3.0E+00	z	4.0E-02	۷	1.0E-02	σ
Butyl benzyl phthalate	85-68-7	2.2E+02	٩	2.2E+02	٩	2.2E+02	٩	7.3E-01	z
Cadmium	7440-43-9	3.9E+00	z	1.0E+02	z	2.0E+01	Γ	5.0E-03	MCL
Carbon Disulfide	75-15-0	3.6E+01	z	2.5E+02	z	1.1E+01	A	1.0E-01	z
Carbon Tetrachloride	56-23-5	1.8E-01	z	1.1E+00	c	1.1E-01	A	5.0E-03	MCL
Chlordane	57-74-9	1.6E+00	U	1.0E+01	U	1.2E+01	A	2.0E-03	MCL
Chloroaniline,p-	106-47-8	1.6E+01	z	1.7E+02	z	1.5E+00	A	2.0E-02	Ø
Chlorobenzene	108-90-7	1.7E+01	z	1.2E+02	z	3.0E+00	A	1.0E-01	MCL
Chlorodibromomethane	124-48-1	2.2E+00	ပ	5.4E+00	c	1.0E+00	A	1.0E-01	MCL
Chloroethane (Ethylchloride)	75-00-3	4.1E+00	U	8.2E+00	U	3.5E-02	A	1.0E-02	Ø
Chloroform	67-66-3	4.4E-02	z	3.0E-01	z	9.0E-01	A	1.0E-01	MCL
Chloromethane	74-87-3	3.5E+00	U	7.3E+00	c	1.0E-01	Ø	1.0E-02	Ø
Chloronaphthalene,2-	91-58-7	5.0E+02	z	8.3E+03	z	5.0E+02	A	4.9E-02	z
Chlorophenol,2-	95-57-8	1.5E+01	z	1.4E+02	z	1.4E+00	A	1.0E-02	Ø
Chromium(III)	16065-83-1	1.2E+04	z	3.1E+05	z	1.0E+02	Γ	1.0E-01	MCL

NOTE: See end of Table for designation of letter symbols

		SOIL SSNI		ioo IIOo		WDSS IIUS			
COMPOUND	CAS#	(ma/ka)	NOTE	(ma/ka)	NOTE	(ma/ka)	NOTE	(ma/L)	NOTE
Chromium(VI)	18540-29-97	2.3E+01	z	6.1E+02	z	1.0E+02		1.0E-01	MCL
Chrysene	218-01-9	6.2E+01	υ	2.9E+02	υ	7.6E+01	A	1.6E-03	N
Cobalt	7440-48-4	4.7E+02	z	1.2E+04	z	4.4E+03	Г	2.2E-01	z
Copper	7440-50-8	3.1E+02	z	8.2E+03	z	1.5E+03	ა	1.3E+00	MCL
Cyanide (free)	57-12-5	1.5E+02	z	3.6E+03	z	4.0E+02	Г	2.0E-01	MCL
DDD	72-54-8	2.4E+00	υ	1.6E+01	ပ	1.5E+00	A	2.8E-04	ပ
DDE	72-55-9	1.7E+00	U	1.1E+01	ပ	2.0E+00	۷	2.0E-04	ပ
DDT	50-29-3	1.7E+00	υ	1.2E+01	ပ	2.4E+01	۷	3.0E-04	ø
Dibenz(a,h)anthracene	53-70-3	3.3E-01	a	3.3E-01	a	5.4E+02	۷	2.5E-03	a
Dibenzofuran	132-64-9	2.9E+01	z	1.5E+02	٩	2.4E+01	۷	1.0E-02	ø
Dibromo-3-chloropropane,1,2-	96-12-8	1.8E-01	z	1.6E+00	z	1.0E-02	a	2.0E-04	MCL
Dichlorobenzene, 1, 2-	95-50-1	9.9E+01	z	3.8E+02	٩	2.9E+01	۷	6.0E-01	MCL
Dichlorobenzene, 1, 3-	541-73-1	2.1E+00	z	1.8E+01	z	2.1E+00	۷	1.0E-02	a
Dichlorobenzene, 1, 4-	106-46-7	6.7E+00	U	1.6E+01	ပ	5.7E+00	۷	7.5E-02	MCL
Dichlorobenzidine, 3, 3-	91-94-1	9.7E-01	С	4.2E+00	c	1.8E+00	A	2.0E-02	Ø
Dichloroethane, 1, 1-	75-34-3	6.6E+01	Ν	4.7E+02	N	7.5E+00	A	8.1E-02	z
Dichloroethane, 1, 2-	107-06-2	8.2E-01	С	1.8E+00	c	3.5E-02	A	5.0E-03	MCL
Dichloroethene, 1, 1-	75-35-4	1.3E+01	z	9.1E+01	z	8.5E-02	۷	7.0E-03	MCL
Dichloroethene, cis, 1, 2-	156-59-2	4.8E+00	z	3.4E+01	z	4.9E-01	A	7.0E-02	MCL
Dichloroethene, trans, 1, 2-	156-60-5	6.9E+00	z	4.8E+01	z	7.7E-01	۷	1.0E-01	MCL
Dichlorophenol,2,4-	120-83-2	1.6E+01	z	2.0E+02	z	1.2E+01	A	1.1E-02	z
Dichloropropane, 1, 2-	78-87-5	6.9E-01	z	1.8E+00	ပ	4.2E-02	۷	5.0E-03	MCL
Dichloropropene, 1, 3-	542-75-6	3.1E+00	U	1.0E+01	ပ	4.0E-02	۷	5.0E-03	ø
Dieldrin	60-57-1	3.0E-02	С	1.5E-01	С	7.6E+00	A	2.5E-03	Ø
Diethylphthalate	84-66-2	6.7E+02	Ч	6.7E+02	Ч	3.6E+02	A	2.9E+00	z
Dimethylphenol,2,4-	105-67-9	9.3E+01	z	1.1E+03	z	2.0E+01	A	7.3E-02	z
Dimethylphthalate	131-11-3	1.5E+03	Ч	1.5E+03	Ч	1.5E+03	Ч	3.7E+01	z
Di-n-octylphthalate	117-84-0	2.4E+02	Ν	3.5E+03	z	1.0E+04	Ч	2.0E-02	M
Dinitrobenzene, 1, 3-	99-65-0	4.5E-01	z	5.0E+00	z	2.5E-01	Ø	1.0E-02	Ø
Dinitrophenol,2,4-	51-28-5	7.1E+00	z	6.9E+01	z	1.7E+00	Ø	5.0E-02	Ø
Dinitrotoluene,2,6-	606-20-2	4.3E+00	z	4.6E+01	z	3.9E-01	A	1.0E-02	Ø
Dinitrotoluene,2,4-	121-14-2	8.9E+00	z	9.8E+01	z	1.0E+00	A	1.0E-02	Ø
Dinoseb	88-85-7	4.7E+00	z	5.4E+01	z	1.4E-01	ø	7.0E-03	MCL
Endosulfan	115-29-7	3.4E+01	z	4.5E+02	z	5.4E+01	A	2.2E-02	z
Endrin	72-20-8	1.8E+00	z	2.5E+01	z	2.6E+00	A	2.0E-03	MCL
Ethvil henzene	100-41-4	1 6E+02	Ν	2 3F+02	۵	1 05+01	4	7 0F-01	СW

		SOIL SSni		SOIL SSI		SOIL SSGW		GW SS	
COMPOUND	CAS #	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/L)	NOTE
Fluoranthene	206-44-0	2.2E+02	z	2.9E+03	z	1.2E+03	۷	1.5E-01	z
Fluorene	86-73-7	2.8E+02	z	5.4E+03	z	2.3E+02	۷	2.4E-02	z
Heptachlor	76-44-8	1.6E-02	ပ	3.5E-02	ပ	5.0E-01	۷	4.0E-04	MCL
Heptachlor epoxide	1024-57-3	5.3E-02	U	2.6E-01	ပ	2.0E+00	۷	2.0E-04	MCL
Hexachlorobenzene	118-74-1	3.4E-01	U	2.0E+00	ပ	9.6E+00	A	1.0E-03	MCL
Hexachlorobutadiene	87-68-3	8.2E-01	z	8.6E+00	z	5.5E+00	A	7.3E-04	z
Hexachlorocyclohexane, alpha	319-84-6	8.2E-02	U	4.4E-01	ပ	6.4E-03	A	3.0E-05	σ
Hexachlorocyclohexane, beta	319-85-7	2.9E-01	υ	1.6E+00	ပ	1.6E-02	A	6.0E-05	σ
Hexachlorocyclohexane,gamma	58-89-9	3.9E-01	U	2.0E+00	ပ	3.3E-02	٨	2.0E-04	MCL
Hexachlorocyclopentadiene	77-47-4	1.4E+00	z	9.4E+00	z	1.2E+03	٨	5.0E-02	MCL
Hexachloroethane	67-72-1	5.2E+00	z	6.8E+01	z	2.2E+00	٨	1.0E-02	σ
Indeno(1,2,3-cd)pyrene	193-39-5	6.2E-01	U	2.9E+00	ပ	9.2E+00	A	3.7E-03	σ
Isobutyl alcohol	78-83-1	7.3E+02	z	6.2E+03	z	3.0E+01	٨	1.1E+00	z
Isophorone	78-59-1	3.4E+02	ပ	1.1E+03	ပ	5.6E-01	A	7.0E-02	ပ
Lead (inorganic)	7439-92-1	4.0E+02	ш	1.4E+03	в	1.0E+02	_	1.5E-02	MCL
Mercury (inorganic)	7487-94-7	2.3E+00	z	6.1E+01	z	4.0E+00	_	2.0E-03	MCL
Methoxychlor	72-43-5	3.0E+01	z	4.3E+02	z	3.8E+02	A	4.0E-02	MCL
Methylene chloride	75-09-2	1.9E+01	U	4.4E+01	ပ	1.7E-02	٨	5.0E-03	MCL
Methyl ethyl ketone	78-93-3	5.9E+02	z	4.4E+03	z	5.0E+00	A	1.9E-01	z
Methyl isobutyl ketone	108-10-1	4.5E+02	Ν	3.1E+03	۲	6.4E+00	۷	2.0E-01	z
Methylnaphthalene,2-	91-57-6	2.2E+01	z	1.7E+02	z	1.7E+00	A	6.2E-04	z
MTBE (methyl tert-butyl ether)	1634-04-4	6.5E+02	Ν	4.7E+03	z	7.7E-02	۷	2.0E-02	T/O
Naphthalene	91-20-3	6.2E+00	z	4.3E+01	z	1.5E+00	A	1.0E-02	σ
Nickel	7440-02-0	1.6E+02	z	4.1E+03	z	1.5E+03	L	7.3E-02	z
Nitrate	14797-55-8	1.3E+04	z	3.3E+05	z	2.0E+04	L	1.0E+01	MCL
Nitrite	14797-65-0	7.8E+02	Ν	2.0E+04	z	2.0E+03	L1	1.0E+00	MCL
Nitroaniline,2-	88-74-4	1.7E+00	σ	1.7E+00	Ø	1.7E+00	ð	5.0E-02	ø
Nitroaniline, 3-	2-60-66	1.3E+01	Ν	1.4E+02	z	1.7E+00	ð	5.0E-02	ø
Nitroaniline,4-	100-01-6	1.0E+01	Ν	1.0E+02	z	1.7E+00	ð	5.0E-02	ø
Nitrobenzene	8-96-86	2.2E+00	Ν	2.5E+01	z	3.3E-01	ð	1.9E-03	ø
Nitrophenol,4-	100-02-7	3.2E+01	z	3.3E+02	z	2.6E+00	۷	5.0E-02	ø
Nitrosodi-n-propylamine,n-	621-64-7	3.3E-01	Ø	3.3E-01	Ø	3.3E-01	Ø	1.0E-02	Ø
N-nitrosodiphenylamine	86-30-6	9.0E+01	с	4.0E+02	ပ	2.1E+00	A	1.4E-02	U
Pentachlorophenol	87-86-5	2.8E+00	ပ	9.7E+00	υ	1.7E+00	ø	1.0E-03	MCL
Phenanthrene	85-01-8	2.1E+03	z	4.3E+04	z	6.6E+02	A	1.8E-01	z
Phenol	108-95-2	1.3E+03	z	1.5E+04	z	1.1E+01	A	1.8E-01	z

NOTE: See end of Table for designation of letter symbols

		SOIL_SSni		SOIL_SSi		SOIL_SSGW		GW_SS	
COMPOUND	CAS #	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/L)	NOTE
Polychlorinated biphenyls	1336-36-3	1.1E-01	z	9.0E-01	υ	1.9E+01	۷	5.0E-04	MCL
Pyrene	129-00-0	2.3E+02	Ν	5.6E+03	z	1.1E+03	A	1.8E-02	z
Selenium	7782-49-2	3.9E+01	z	1.0E+03	z	2.0E+01	_	5.0E-02	MCL
Silver	7440-22-4	3.9E+01	z	1.0E+03	z	1.0E+02	Γ	1.8E-02	z
Styrene	100-42-5	5.0E+02	Ν	1.7E+03	Ч	1.1E+01	A	1.0E-01	MCL
Tetrachlorobenzene, 1, 2, 4, 5-	95-94-3	1.2E+00	Ν	1.2E+01	z	6.9E+00	A	1.1E-03	z
Tetrachloroethane, 1, 1, 1, 2-	630-20-6	2.7E+00	ပ	5.9E+00	ပ	4.6E-02	A	5.0E-03	ø
Tetrachloroethane, 1, 1, 2, 2-	79-34-5	8.1E-01	С	2.0E+00	С	6.0E-03	A	5.0E-04	ø
Tetrachloroethylene	127-18-4	8.3E+00	С	3.5E+01	С	1.8E-01	A	5.0E-03	MCL
Tetrachlorophenol,2,3,4,6-	58-90-2	1.4E+02	Ν	1.4E+03	Ч	3.1E+01	A	1.1E-01	z
Thallium	7440-28-0	5.5E-01	Ν	1.4E+01	N	4.0E+00	۲1	2.0E-03	MCL
Toluene	108-88-3	6.8E+01	z	4.7E+02	z	2.0E+01	A	1.0E+00	MCL
Toxaphene	8001-35-2	4.4E-01	С	2.2E+00	С	3.4E+01	A	3.0E-03	MCL
Trichlorobenzene, 1, 2, 4-	120-82-1	6.6E+01	z	1.2E+03	z	1.4E+01	A	7.0E-02	MCL
Trichloroethane, 1, 1, 1-	71-55-6	8.2E+01	Ν	7.0E+02	z	4.0E+00	A	2.0E-01	MCL
Trichloroethane, 1, 1, 2-	79-00-5	1.9E+00	С	4.3E+00	С	5.8E-02	A	5.0E-03	MCL
Trichloroethene	79-01-6	1.0E-01	С	2.1E-01	c	7.3E-02	A	5.0E-03	MCL
Trichlorofluoromethane	75-69-4	3.8E+01	z	2.6E+02	z	3.7E+01	۷	1.3E-01	z
Trichlorophenol,2,4,5-	95-95-4	5.3E+02	z	6.6E+03	z	3.2E+02	۷	3.7E-01	z
Trichlorophenol,2,4,6-	88-06-2	4.0E+01	С	1.7E+02	U	1.3E+00	A	1.0E-02	Ø
Vanadium	7440-62-2	5.5E+01	Ν	1.4E+03	N	5.2E+02	L1	2.6E-02	z
Vinyl chloride	75-01-4	2.4E-01	С	7.9E-01	С	1.3E-02	A	2.0E-03	MCL
Xylene(mixed)	1330-20-7	1.8E+01	Ν	1.2E+02	N	1.5E+02	Ч	1.0E+01	MCL
Zinc	7440-66-6	2.3E+03	z	6.1E+04	z	2.8E+03	S	1.1E+00	z
Aliphatics C6-C8	NA	1.2E+03	z	8.0E+03	z	1.0E+04	О,Т	3.2E+00	z
Aliphatics >C8-C10	NA	1.2E+02	z	8.8E+02	z	5.3E+03	A	1.5E-01	ø
Aliphatics >C10-C12	NA	2.3E+02	z	2.0E+03	z	1.0E+04	О,Т	1.5E-01	Ø
Aliphatics >C12-C16	NA	3.7E+02	z	3.8E+03	z	1.0E+04	О,Т	1.5E-01	ø
Aliphatics >C16-C35	NA	7.1E+03	z	1.0E+04	О,Т	1.0E+04	О,Т	7.3E+00	z
Aromatics >C8-C10	NA	6.5E+01	z	5.1E+02	z	6.5E+01	۷	1.5E-01	ø
Aromatics >C10-C12	NA	1.2E+02	z	1.1E+03	z	1.0E+02	A	1.5E-01	ø
Aromatics >C12-C16	NA	1.8E+02	z	2.1E+03	z	2.0E+02	۷	1.5E-01	ø
Aromatics >C16-C21	NA	1.5E+02	z	1.7E+03	z	2.1E+03	۷	1.5E-01	ø
Aromatics >C21-C35	AN	1.8E+02	z	2.5E+03	z	1.0E+04	0,T	1.5E-01	ø

		SOIL_SSni		SOIL_SSI		SOIL_SSGW		GW_SS	
COMPOUND	CAS #	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/kg)	NOTE	(mg/L)	NOTE
TPH-GRO	NA	6.5E+01	N,I	5.1E+02	ź	6.5E+01	۲	1.5E-01	ø
TPH-DRO	NA	6.5E+01	N,I	5.1E+02	Ľ,	6.5E+01	۲	1.5E-01	ø
TPH-ORO	NA	1.8E+02	N,I	2.5E+03	N,I	1.0E+04	0,Т	1.5E-01	Ø
A - Based on algorithm containec	t in Appendi	Η							
B - Based on EPA's biokinetic an	d adult lead	cleanup level	models	for lead					
C - Based on carcinogenic health	n effects								
D - DEQ established background	level plus o	ne standard o	deviation	= 11.5					
I - TPH Standards are only applic	cable when u	sed in conjur	nction wit	th Standards	for indic	ator compou	spu		
L - Soil level protective of ground	water for ino	rganic consti	tuents ba	ased on lead	nability				
L1 - Soil level protective of groun	dwater for in	organic cons	tituents t	based on GM	/ 1 becai	se TCLP va	lue not lis	sted	
M - Based on EPA's Maximum C	ontaminant I	-evel (MCL) f	or drinkii	ng water					
N - Based on non-carcinogenic h	ealth effects								
O - Ceiling value based on aesth	etic consider	ations							
P - Soil Saturation Limit is less th	an health ba	ised level thu	s default	to soil satura	ation limi	t			
Q - Based on analytical quantitati	ion limit								
S - Soil level protective of ground	lwater for inc	organic consti	tuents ba	ased on the r	naximun	n concentrati	on for the		
beneficial use of sewage sluc	lge								
T - TPH shall not exceed 10,000									
W - Solubility limit is less than he	alth based li	mit thus defa	ult to soli	ubility limit					
T/O - EPA taste/odor advisory va	lue								

COMPOUND	CAS#	SOILni	NOTE	SOILi	NOTE	SOILGW1	NOTE	SOILGW2	NOTE	SOILGW3DW	NOTE	SOILGW3NDW	NOTE	SOILsat	SOILesni*	SOILesi*
Acenaphthene	83-32-9	3.7E+03	z	6.1E+04	z	2.2E+02	A	2.2E+02	X DF 2	2.5E+02	X DF3	3.2E+02	X DF 3	NA	7.3E+04	2.5E+05
Acenaphthylene	208-96-8	3.5E+03	z	5.1E+04	z	8.8E+01	A	8.8E+01	X DF 2	1.4E+02	X DF3	1.9E+02	X DF 3	NA	3.8E+04	1.3E+05
Acetone	67-64-1	1.7E+03	z	1.4E+04	z	1.5E+00	A	1.5E+00	X DF 2	8.5E+00	X DF3	1.8E+02	X DF 3	1.3E+05	6.6E+02	2.3E+03
Aldrin	309-00-2	2.8E-02	ပ	1.3E-01	ပ	1.1E+01	A	1.1E+01	ш	1.1E+01	т	1.1E+01	т	AN		
Aniline	62-53-3	2.4E+01	z	1.7E+02	z	6.5E-02	۷	6.5E-02	X DF 2	3.2E-02	X DF3	4.4E-01	X DF 3	1.0E+04		
Anthracene	120-12-7	2.2E+04	z	4.8E+05	z	1.2E+02	A	1.2E+02	X DF 2	1.2E+02	X DF3	1.2E+02	X DF 3	AN	1.0E+06	1.0E+06
Antimony	7440-36-0	3.1E+01	z	8.2E+02	z	1.2E+01	5	1.2E+01	5	1.2E+01	5	1.2E+01	2	NA		
Arsenic	7440-38-2	1.2E+01	۵	1.2E+01	۵	1.0E+02	_	1.0E+02	_	1.0E+02		1.0E+02	_	AN		
Barium	7440-39-3	5.5E+03	z	1.4E+05	z	2.0E+03	_	2.0E+03	_	2.0E+03	_	2.0E+03	_	AN		
Benzene	71-43-2	1.5E+00	ပ	3.1E+00	ပ	5.1E-02	۷	5.1E-02	X DF 2	1.1E-02	X DF3	1.3E-01	X DF 3	9.0E+02	1.0E+00	2.5E+00
Benz(a)anthracene	56-55-3	6.2E-01	ပ	2.9E+00	ပ	3.3E+02	٩	3.9E+00	X DF 2	1.6E-02	X DF3	1.6E-02	X DF 3	AN		
Benzo(a)pyrene	50-32-8	3.3E-01	ø	3.3E-01	ø	2.3E+01	A	2.3E+01	X DF 2	2.3E+01	X DF3	2.3E+01	X DF 3	NA		
Benzo(b)fluoranthene	205-99-2	6.2E-01	ပ	2.9E+00	ပ	2.2E+02	A	1.3E+01	X DF 2	1.3E+01	U	1.3E+01	U	AN		
Benzo(k)fluoranthene	207-08-9	6.2E+00	U	2.9E+01	c	1.2E+02	A	1.2E+02	X DF 2	1.2E+02	ŋ	1.2E+02	Ð	NA		
Beryllium	7440-41-7	1.6E+02	z	4.1E+03	z	8.0E+00	5	8.0E+00	5	8.0E+00	5	8.0E+00	5	AN		
Biphenyl, 1, 1-	92-52-4	2.9E+03	z	4.4E+04	z	1.9E+02	٩	1.9E+02	X DF 2	1.4E+02	X DF3	1.7E+02	X DF 3	2.3E+02	4.6E+03	1.1E+04
Bis(2-chloroethyl)ether	111-44-4	3.3E-01	ø	1.1E+00	c	3.3E-01	Ø	6.6E-02	ш	3.3E-01	Ø	2.4E-03	X DF 3	9.8E+03	7.6E+00	1.9E+01
Bis(2-chloroisopropyl)ether	108-60-1	4.9E+00	с	1.7E+01	c	8.0E-01	ø	2.7E-03	X DF 2	3.1E-03	X DF3	8.2E-03	X DF 3	8.4E+02	1.0E+00	5.5E+00
Bis(2-ethyl-hexyl)phthalate	117-81-7	3.5E+01	U	1.7E+02	c	7.9E+01	A	7.9E+01	X DF 2	7.9E+01	X DF3	7.9E+01	X DF 3	2.2E+02		
Bromodichloromethane	75-27-4	1.8E+00	ပ	4.2E+00	ပ	9.2E-01	٩	9.2E-01	X DF 2	9.2E-01	U	3.0E-02	X DF 3	3.1E+03	8.2E-02	4.3E-01
Bromoform	75-25-2	4.8E+01	ပ	1.8E+02	c	1.8E+00	A	1.8E+00	X DF 2	6.9E-02	X DF3	6.1E-01	X DF 3	2.7E+03	1.4E+01	7.4E+01
Bromomethane	74-83-9	4.3E+00	z	3.0E+01	z	4.0E-02	A	3.5E-02	X DF 2	1.8E-01	X DF3	2.1E+00	X DF 3	3.0E+03	1.9E-01	6.4E-01
Butyl benzyl phthalate	85-68-7	1.2E+04	z	1.7E+05	z	4.4E+03	A	4.4E+03	X DF 2	1.5E+03	X DF3	1.7E+03	X DF 3	2.2E+02		
Cadmium	7440-43-9	3.9E+01	z	1.0E+03	z	2.0E+01	_	2.0E+01		2.0E+01		2.0E+01	_	NA		
Carbon Disulfide	75-15-0	3.6E+02	z	2.5E+03	z	1.1E+01	A	1.1E+01	X DF 2	2.9E+01	X DF3	1.5E+02	X DF 3	6.0E+02	9.2E-01	2.3E+00
Carbon Tetrachloride	56-23-5	5.3E-01	С	1.1E+00	С	1.1E-01	A	1.1E-01	X DF 2	5.0E-03	X DF3	2.7E-02	X DF 3	9.1E+02	2.6E-01	6.4E-01
Chlordane	57-74-9	1.6E+00	С	1.0E+01	С	1.2E+01	A	1.2E+01	X DF 2	1.2E+01	G	1.2E+01	G	NA		
Chloroaniline,p-	106-47-8	1.6E+02	z	1.7E+03	z	1.5E+00	A	1.5E+00	X DF 2	1.2E+00	X DF3	7.0E+00	X DF 3	NA		
Chlorobenzene	108-90-7	1.7E+02	z	1.2E+03	z	3.0E+00	A	3.0E+00	X DF 2	3.0E+00	X DF3	2.1E+01	X DF 3	7.0E+02	4.8E+02	1.2E+03
Chlorodibromomethane	124-48-1	2.2E+00	U	5.4E+00	U	1.0E+00	۷	1.0E+00	X DF 2	3.9E-03	X DF3	5.1E-02	X DF 3	1.3E+03	2.0E-01	1.1E+00
Chloroethane (Ethylchloride)	75-00-3	4.1E+00	c	8.2E+00	c	3.5E-02	A	1.3E-02	X DF 2	4.4E+01	X DF3	4.3E+02	X DF 3	9.9E+02	3.7E+02	9.1E+02
Chloroform	67-66-3	4.4E-01	z	1.2E+00	С	9.0E-01	A	9.0E-01	X DF 2	4.8E-02	X DF3	6.3E-01	X DF 3	3.6E+03	4.1E-01	1.0E+00
Chloromethane	74-87-3	3.5E+00	c	7.3E+00	c	1.0E-01	Ø	9.1E-03	X DF 2	1.5E-02	X DF3	2.2E-01	X DF 3	1.6E+03	1.2E+00	3.0E+00
Chloronaphthalene,2-	91-58-7	5.0E+03	z	8.3E+04	z	5.0E+02	۷	5.0E+02	X DF 2	3.3E+02	X DF3	3.7E+02	X DF 3	AN	1.1E+05	3.6E+05
Chlorophenol,2-	95-57-8	1.5E+02	z	1.4E+03	z	1.4E+00	۷	1.4E+00	X DF 2	4.6E-03	X DF3	5.8E+00	X DF 3	5.1E+04	1.7E+02	5.7E+02

NOTE: See end of Table for designation of letter symbols and footnotes.
Spill and Emergency
Response

T 2 - 1

LDEQ RECAP TABLE 2 MANAGEMENT OPTION 1 STANDARDS FOR SOIL (mg/kg)

COMPOUND	CAS#	SOILni	NOTE	SOILi	NOTE	SOILGW1	NOTE	SOILGW2	NOTE	SOILGW3DW	NOTE	SOILGW3NDW	NOTE	SOILsat	SOILesni*	SOILesi*
Chromium(III)	16065-83-1	1.2E+05	z	1.0E+06	0	1.0E+02	_	1.0E+02	_	1.0E+02	_	1.0E+02	_	NA		
Chromium(VI)	18540-29-97	2.3E+02	z	6.1E+03	z	1.0E+02	_	1.0E+02	_	1.0E+02	Γ	1.0E+02	Γ	AN		
Chrysene	218-01-9	6.2E+01	с	2.9E+02	c	7.6E+01	A	7.6E+01	X DF 2	1.8E+00	X DF3	1.8E+00	X DF 3	AN		
Cobalt	7440-48-4	4.7E+03	z	1.2E+05	z	4.4E+03	L1	4.4E+03	5	4.4E+03	5	4.4E+03	5	NA		
Copper	7440-50-8	3.1E+03	z	8.2E+04	z	1.5E+03	S	1.5E+03	S	1.5E+03	S	1.5E+03	S	NA		
Cyanide (free)	57-12-5	1.5E+03	z	3.6E+04	z	4.0E+02	5	4.0E+02	5	4.0E+02	5	4.0E+02	5	NA		
DDD	72-54-8	2.4E+00	υ	1.6E+01	o	1.5E+00	A	1.5E+00	X DF 2	1.5E+00	ი	1.5E+00	ი	NA		
DDE	72-55-9	1.7E+00	υ	1.1E+01	U	2.0E+00	۷	2.0E+00	X DF 2	2.0E+00	ი	2.0E+00	თ	AN		
DDT	50-29-3	1.7E+00	υ	1.2E+01	o	2.4E+01	۷	1.6E+01	X DF 2	1.6E+01	ი	1.6E+01	ი	AN		
Dibenz(a,h)anthracene	53-70-3	3.3E-01	σ	3.3E-01	ø	5.4E+02	A	2.0E+00	X DF 2	2.0E+00	U	2.0E+00	თ	NA		
Dibenzofuran	132-64-9	2.9E+02	z	6.5E+03	z	2.4E+01	۷	2.4E+01	X DF 2	1.3E+01	X DF3	1.5E+01	X DF 3	1.5E+02	7.1E+04	2.4E+05
Dibromo-3-chloropropane,1,2-	96-12-8	3.5E-01	υ	1.8E+00	o	1.0E-02	a	2.6E-03	X DF 2	2.6E-03	X DF3	2.6E-03	X DF 3	7.8E+02		
Dichlorobenzene, 1, 2-	95-50-1	9.9E+02	z	7.4E+03	z	2.9E+01	A	2.9E+01	X DF 2	2.9E+01	X DF3	1.6E+02	X DF 3	3.8E+02	3.1E+02	1.1E+03
Dichlorobenzene, 1, 3-	541-73-1	2.1E+01	z	1.8E+02	z	2.1E+00	۷	1.1E+00	X DF 2	3.8E+00	X DF3	9.2E+00	X DF 3	1.3E+03	1.3E+01	4.4E+01
Dichlorobenzene, 1, 4-	106-46-7	6.7E+00	υ	1.6E+01	U	5.7E+00	۷	5.7E+00	X DF 2	5.7E+00	X DF3	5.7E+00	X DF 3	AN	2.6E+03	6.5E+03
Dichlorobenzidine, 3, 3-	91-94-1	9.7E-01	υ	4.2E+00	o	1.8E+00	۷	1.3E-02	X DF 2	1.1E-03	X DF3	1.4E-03	X DF 3	AN		
Dichloroethane, 1, 1-	75-34-3	6.6E+02	z	4.7E+03	z	7.5E+00	۷	7.5E+00	X DF 2	2.7E+01	X DF3	1.8E+02	X DF 3	2.3E+03	4.7E+01	1.6E+02
Dichloroethane, 1, 2-	107-06-2	8.2E-01	υ	1.8E+00	o	3.5E-02	۷	3.5E-02	X DF 2	2.6E-03	X DF3	4.8E-02	X DF 3	3.0E+03	1.1E+00	2.6E+00
Dichloroethene, 1, 1-	75-35-4	1.3E+02	z	9.1E+02	z	8.5E-02	۷	8.5E-02	X DF 2	6.1E-04	X DF3	7.0E-03	X DF 3	1.4E+03	4.3E+00	1.5E+01
Dichloroethene, cis, 1, 2-	156-59-2	4.8E+01	z	3.4E+02	z	4.9E-01	۷	4.9E-01	X DF 2	4.9E-01	X DF3	1.2E+01	X DF 3	1.2E+03	3.4E+00	1.2E+01
Dichloroethene, trans, 1, 2-	156-60-5	6.9E+01	z	4.8E+02	z	7.7E-01	A	7.7E-01	X DF 2	7.7E-01	X DF3	1.9E+01	X DF 3	2.4E+03	3.4E+00	1.2E+01
Dichlorophenol,2,4-	120-83-2	1.6E+02	z	2.0E+03	z	1.2E+01	A	1.2E+01	X DF 2	3.2E-02	X DF3	2.5E+01	X DF 3	NA		
Dichloropropane, 1, 2-	78-87-5	8.3E-01	с	1.8E+00	c	4.2E-02	A	4.2E-02	X DF 2	4.2E-02	X DF3	4.2E-02	X DF 3	1.2E+03	1.3E+03	3.1E+03
Dichloropropene, 1, 3-	542-75-6	3.1E+00	с	1.0E+01	c	4.0E-02	A	3.2E-03	X DF 2	8.0E-02	X DF3	1.3E+00	X DF 3	1.1E+03	3.1E+01	7.7E+01
Dieldrin	60-57-1	3.0E-02	c	1.5E-01	c	7.6E+00	A	7.6E+00	ш	7.6E+00	т	7.6E+00	I	AN		
Diethylphthalate	84-66-2	3.6E+04	z	3.9E+05	z	3.6E+02	A	3.6E+02	X DF 2	1.6E+02	X DF3	2.8E+02	X DF 3	6.7E+02		
Dimethylphenol,2,4-	105-67-9	9.3E+02	z	1.1E+04	z	2.0E+01	A	2.0E+01	X DF 2	7.6E+00	X DF3	1.2E+01	X DF 3	AN		
Dimethylphthalate	131-11-3	4.2E+05	z	1.0E+06	0	2.8E+03	A	2.8E+03	X DF 2	1.6E+03	X DF3	4.3E+03	X DF 3	1.5E+03		
Di-n-octylphthalate	117-84-0	2.4E+03	z	3.5E+04	z	2.0E+05	A	2.0E+05	X DF 2	2.0E+05	X DF3	2.0E+05	X DF 3	1.0E+04		
Dinitrobenzene, 1, 3-	99-65-0	4.5E+00	z	5.0E+01	z	2.5E-01	Ø	7.5E-02	X DF 2	6.4E-02	X DF3	5.7E-01	X DF 3	5.5E+02		
Dinitrophenol,2,4-	51-28-5	7.1E+01	z	6.9E+02	z	1.7E+00	Ø	3.4E-01	X DF 2	2.8E-01	X DF3	2.3E+00	X DF 3	AN		
Dinitrotoluene,2,6-	606-20-2	4.3E+01	z	4.6E+02	z	3.9E-01	A	3.9E-01	X DF 2	3.1E-01	X DF3	1.8E+00	X DF 3	NA		
Dinitrotoluene,2,4-	121-14-2	8.9E+01	z	9.8E+02	z	1.0E+00	A	1.0E+00	X DF 2	7.9E-01	X DF3	4.1E+00	X DF 3	AN		
Dinoseb	88-85-7	4.7E+01	z	5.4E+02	z	1.4E-01	Ø	1.2E-01	X DF 2	1.2E-01	X DF3	4.4E-01	X DF 3	NA		
Endosulfan	115-29-7	3.4E+02	z	4.5E+03	z	5.4E+01	۷	5.4E+01	X DF 2	5.4E+01	U	1.6E-01	X DF 3	AN		

NOTE: See end of Table for designation of letter symbols and footnotes.

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COMPOUND	CAS#	SOILni	NOTE	SOILI	NOTE	SOILGW1	NOTE	SOILGW2	NOTE	SOILGW3DW	NOTE	SOILGW3NDW	NOTE	SOILsat	SOILesni*	SOILesi*
Endrin	72-20-8	1.8E+01	z	2.5E+02	z	2.6E+00	A	2.6E+00	X DF 2	3.4E-01	X DF3	3.4E-01	X DF 3	AN		
Ethyl benzene	100-41-4	1.6E+03	z	1.3E+04	z	1.9E+01	A	1.9E+01	X DF 2	6.6E+01	X DF3	2.2E+02	X DF 3	2.3E+02	1.9E+03	4.8E+03
Fluoranthene	206-44-0	2.2E+03	z	2.9E+04	z	1.2E+03	۷	1.2E+03	X DF 2	1.8E+02	X DF3	1.9E+02	X DF 3	AN		
Fluorene	86-73-7	2.8E+03	z	5.4E+04	z	2.3E+02	٩	2.3E+02	X DF 2	6.8E+01	X DF3	7.2E+01	X DF 3	AN	1.9E+05	6.4E+05
Heptachlor	76-44-8	1.6E-02	ပ	3.5E-02	U	5.0E-01	۷	5.0E-01	X DF 2	5.0E-01	U	5.0E-01	ს	AN		
Heptachlor epoxide	1024-57-3	5.3E-02	ပ	2.6E-01	U	2.0E+00	A	2.0E+00	X DF 2	2.0E+00	X DF3	2.0E+00	X DF 3	AN		
Hexachlorobenzene	118-74-1	3.4E-01	ပ	2.0E+00	U	9.6E+00	A	9.6E+00	X DF 2	9.6E+00	U	9.6E+00	U	AN	1.1E+02	2.6E+02
Hexachlorobutadiene	87-68-3	4.5E+00	ပ	1.6E+01	ပ	5.5E+00	٩	5.5E+00	X DF 2	5.8E-01	X DF3	7.1E-01	X DF 3	1.0E+03		
Hexachlorocyclohexane, alpha	319-84-6	8.2E-02	ပ	4.4E-01	U	6.4E-03	٩	2.2E-03	X DF 2	3.7E-04	X DF3	5.5E-04	X DF 3	AN		
Hexachlorocyclohexane, beta	319-85-7	2.9E-01	ပ	1.6E+00	U	1.6E-02	۷	9.5E-03	X DF 2	1.3E-03	X DF3	1.7E-03	X DF 3	AN		
Hexachlorocyclohexane, gamma	58-89-9	3.9E-01	ပ	2.0E+00	U	3.3E-02	٩	3.3E-02	X DF 2	1.8E-02	X DF3	3.3E-02	X DF 3	AN		
Hexachlorocyclopentadiene	77-47-4	1.4E+01	z	9.4E+01	z	1.2E+03	A	1.2E+03	X DF 2	1.2E+03	X DF3	1.2E+03	X DF 3	2.2E+03	4.6E+01	1.6E+02
Hexachloroethane	67-72-1	3.2E+01	ပ	1.4E+02	U	2.2E+00	A	1.7E-01	X DF 2	2.2E-01	X DF3	3.8E-01	X DF 3	AN	2.1E+03	5.2E+03
Indeno(1,2,3-cd)pyrene	193-39-5	6.2E-01	С	2.9E+00	С	9.2E+00	A	9.2E+00	X DF 2	9.2E+00	9	9.2E+00	ŋ	NA		
Isobutyl alcohol	78-83-1	7.3E+03	z	6.2E+04	z	3.0E+01	A	3.0E+01	X DF 2	2.7E+01	X DF3	4.3E+02	X DF 3	1.2E+04		
Isophorone	78-59-1	3.4E+02	ပ	1.1E+03	U	5.6E-01	٩	5.6E-01	X DF 2	2.7E-01	X DF3	2.6E+00	X DF 3	4.9E+03		
Lead (inorganic)	7439-92-1	4.0E+02	В	1.4E+03	В	1.0E+02	Γ	1.0E+02	L	1.0E+02	Γ	1.0E+02	Γ	NA		
Mercury (inorganic)	7487-94-7	2.3E+01	z	6.1E+02	z	4.0E+00	L	4.0E+00	Γ	4.0E+00	Γ	4.0E+00	L	NA		
Methoxychlor	72-43-5	3.0E+02	z	4.3E+03	z	3.8E+02	A	3.8E+02	X DF 2	3.8E+02	X DF3	3.8E+02	X DF 3	AN		
Methylene chloride	75-09-2	1.9E+01	С	4.4E+01	С	1.7E-02	A	1.7E-02	X DF 2	1.5E-02	X DF3	2.9E-01	X DF 3	2.2E+03	1.3E+01	3.2E+01
Methyl ethyl ketone	78-93-3	5.9E+03	z	4.4E+04	z	5.0E+00	A	5.0E+00	X DF 2	5.2E+01	X DF3	1.0E+03	X DF 3	2.9E+04	2.8E+04	6.9E+04
Methyl isobutyl ketone	108-10-1	4.5E+03	z	6.3E+04	z	6.4E+00	A	6.4E+00	X DF 2	8.3E+00	X DF3	9.7E+01	X DF 3	3.1E+03	5.7E+03	1.4E+04
Methylnaphthalene,2-	91-57-6	2.2E+02	z	1.7E+03	z	1.7E+00	A	1.7E+00	X DF 2	7.0E+00	X DF3	7.3E+00	X DF 3	NA	1.0E+03	3.5E+03
MTBE (methyl tert-butyl ether)	1634-04-4	6.5E+03	z	4.7E+04	z	7.7E-02	A	7.7E-02	X DF 2	7.7E-02	X DF3	2.1E+03	X DF 3	9.8E+03	8.0E+02	2.8E+03
Naphthalene	91-20-3	6.2E+01	z	4.3E+02	z	1.5E+00	A	9.0E-01	X DF 2	2.5E+01	X DF3	3.2E+01	X DF 3	NA	6.3E+01	2.2E+02
Nickel	7440-02-0	1.6E+03	z	4.1E+04	z	1.5E+03	L1	1.5E+03	L1	1.5E+03	L1	1.5E+03	L1	NA		
Nitrate	14797-55-8	1.3E+05	z	1.0E+06	0	2.0E+04	L1	2.0E+04	L1	2.0E+04	L1	2.0E+04	L1	NA		
Nitrite	14797-65-0	7.8E+03	z	2.0E+05	z	2.0E+03	2	2.0E+03	5	2.0E+03	2	2.0E+03	2	AN		
Nitroaniline,2-	88-74-4	1.7E+00	Ø	5.2E+00	z	1.7E+00	Ø	1.7E+00	ø	3.9E-01	X DF3	2.3E+00	X DF 3	2.8E+02	2.8E-01	9.5E-01
Nitroaniline, 3-	99-09-2	1.3E+02	z	1.4E+03	z	1.7E+00	Ø	8.5E-02	X DF 2	4.4E-01	X DF3	4.3E+00	X DF 3	2.8E+02	3.5E+02	1.2E+03
Nitroaniline,4-	100-01-6	1.0E+02	z	1.0E+03	z	1.7E+00	Ø	4.3E-01	X DF 2	3.7E-01	X DF3	3.6E+00	X DF 3	1.4E+02		
Nitrobenzene	98-95-3	2.2E+01	z	2.5E+02	z	3.3E-01	Ø	5.7E-02	X DF 2	2.5E-01	X DF3	1.6E+00	X DF 3	1.8E+03	3.2E+03	7.9E+03
Nitrophenol,4-	100-02-7	3.2E+02	z	3.3E+03	z	2.6E+00	A	2.6E+00	X DF 2	2.1E+00	X DF3	1.2E+01	X DF 3	5.4E+03		
Nitrosodi-n-propylamine,n-	621-64-7	3.3E-01	ø	3.3E-01	ø	3.3E-01	ø	5.3E-02	ш	5.3E-02	т	3.3E-01	ø	AN		
N-nitrosodiphenylamine	86-30-6	9.0E+01	U	4.0E+02	U	2.1E+00	٩	2.1E+00	X DF 2	3.5E-01	X DF3	5.1E-01	X DF 3	AN		

NOTE: See end of Table for designation of letter symbols and footnotes.
Spill and Emergency
Response

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LDEQ RECAP TABLE 2 MANAGEMENT OPTION 1 STANDARDS FOR SOIL (mg/kg)

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COMPOUND	CAS#	SOILni	NOTE	SOILi	NOTE	SOILGW1	NOTE	SOILGW2	NOTE	SOILGW3DW	NOTE	SOILGW3NDW	NOTE	SOILsat	SOILesni*	SOILesi*
Pentachlorophenol	87-86-5	2.8E+00	С	9.7E+00	c	1.7E+00	Ø	1.1E-01	X DF 2	1.1E-01	X DF3	1.1E-01	X DF 3	NA		
Phenanthrene	85-01-8	2.1E+04	z	4.3E+05	z	6.6E+02	۷	6.6E+02	X DF 2	1.2E+02	X DF3	1.2E+02	X DF 3	AN	1.0E+06	1.0E+06
Phenol	108-95-2	1.3E+04	z	1.5E+05	z	1.1E+01	A	1.1E+01	X DF 2	5.5E+01	X DF3	4.9E+02	X DF 3	NA	3.5E+04	1.2E+05
Polychlorinated biphenyls	1336-36-3	2.1E-01	ပ	9.0E-01	ပ	1.9E+01	A	1.9E+01	X DF 2	1.9E+01	U	1.9E+01	U	5.7E+01		
Pyrene	129-00-0	2.3E+03	z	5.6E+04	z	1.1E+03	A	1.1E+03	X DF 2	1.1E+03	X DF3	1.1E+03	X DF 3	NA	1.0E+06	1.0E+06
Selenium	7782-49-2	3.9E+02	z	1.0E+04	z	2.0E+01	_	2.0E+01	_	2.0E+01	_	2.0E+01	_	AA		
Silver	7440-22-4	3.9E+02	z	1.0E+04	z	1.0E+02	_	1.0E+02	_	1.0E+02	_	1.0E+02	_	AA		
Styrene	100-42-5	5.0E+03	z	4.3E+04	z	1.1E+01	A	1.1E+01	X DF 2	1.1E+01	X DF3	7.9E+02	X DF 3	1.7E+03	2.3E+03	5.7E+03
Tetrachlorobenzene, 1, 2, 4, 5-	95-94-3	1.2E+01	z	1.2E+02	z	6.9E+00	٩	6.9E+00	X DF 2	3.4E-01	X DF3	3.6E-01	X DF 3	1.9E+01		
Tetrachloroethane, 1, 1, 1, 2-	630-20-6	2.7E+00	υ	5.9E+00	ပ	4.6E-02	٩	3.9E-03	X DF 2	7.7E-03	X DF3	2.0E-02	X DF 3	5.0E+02	2.5E-02	6.3E-02
Tetrachloroethane, 1, 1, 2, 2-	79-34-5	8.1E-01	υ	2.0E+00	ပ	6.0E-03	٩	6.5E-04	X DF 2	1.9E-03	X DF3	2.2E-02	X DF 3	1.8E+03	3.3E+00	8.0E+00
Tetrachloroethylene	127-18-4	8.3E+00	υ	3.5E+01	ပ	1.8E-01	٩	1.8E-01	X DF 2	2.3E-02	X DF3	8.9E-02	X DF 3	3.6E+02	1.2E+01	2.9E+01
Tetrachlorophenol, 2, 3, 4, 6-	58-90-2	1.4E+03	z	1.7E+04	z	3.1E+01	٩	3.1E+01	X DF 2	4.2E+00	X DF3	5.0E+00	X DF 3	1.4E+03		
Thallium	7440-28-0	5.5E+00	z	1.4E+02	z	4.0E+00	5	4.0E+00	1	4.0E+00	-1	4.0E+00	-1	AN		
Toluene	108-88-3	6.8E+02	z	4.7E+03	z	2.0E+01	A	2.0E+01	X DF 2	1.2E+02	X DF3	9.1E+02	X DF 3	5.2E+02	5.5E+01	1.4E+02
Toxaphene	8001-35-2	4.4E-01	υ	2.2E+00	ပ	3.4E+01	٩	3.4E+01	X DF 2	3.4E+01	ს	3.4E+01	U	AN		
Trichlorobenzene, 1, 2, 4-	120-82-1	6.6E+02	z	1.2E+04	z	1.4E+01	٩	1.4E+01	X DF 2	1.4E+01	X DF3	3.8E+01	X DF 3	AN	3.9E+03	1.3E+04
Trichloroethane, 1, 1, 1-	71-55-6	8.2E+02	z	7.0E+03	z	4.0E+00	٩	4.0E+00	X DF 2	4.0E+00	X DF3	1.8E+02	X DF 3	1.3E+03	6.2E+01	2.1E+02
Trichloroethane, 1, 1, 2-	79-00-5	1.9E+00	υ	4.3E+00	ပ	5.8E-02	٩	5.8E-02	X DF 2	6.5E-03	X DF3	8.0E-02	X DF 3	2.5E+03	4.1E+00	1.0E+01
Trichloroethene	79-01-6	1.0E-01	ပ	2.1E-01	ပ	7.3E-02	٩	7.3E-02	X DF 2	4.1E-02	X DF3	3.0E-01	X DF 3	8.0E+02	4.2E+00	1.0E+01
Trichlorofluoromethane	75-69-4	3.8E+02	z	2.6E+03	z	3.7E+01	۷	3.7E+01	X DF 2	2.0E+02	X DF3	5.8E+02	X DF 3	1.6E+03	9.9E+00	3.4E+01
Trichlorophenol, 2, 4, 5-	95-95-4	5.3E+03	z	6.6E+04	z	3.2E+02	٩	3.2E+02	X DF 2	4.7E+01	X DF3	5.6E+01	X DF 3	AN		
Trichlorophenol, 2, 4, 6-	88-06-2	4.0E+01	U	1.7E+02	c	1.3E+00	A	7.9E-01	X DF 2	8.6E-02	X DF3	1.1E-01	X DF 3	NA		
Vanadium	7440-62-2	5.5E+02	z	1.4E+04	z	5.2E+02	5	5.2E+02	5	5.2E+02	5	5.2E+02	2	AN		
Vinyl chloride	75-01-4	2.4E-01	ပ	7.9E-01	ပ	1.3E-02	٩	1.3E-02	X DF 2	1.3E-02	X DF3	2.4E-01	X DF 3	9.2E+02	1.1E-02	2.8E-02
Xylene(mixed)	1330-20-7	1.8E+02	z	1.2E+03	z	1.8E+02	A	1.8E+02	X DF 2	1.8E+02	X DF3	1.8E+02	X DF 3	1.5E+02	1.5E+01	5.1E+01
Zinc	7440-66-6	2.3E+04	z	6.1E+05	z	2.8E+03	S	2.8E+03	S	2.8E+03	S	2.8E+03	S	AA		
Aliphatics C6-C8	NA	1.0E+04	0,T	1.0E+04	0,Т	1.0E+04	0,Т	1.0E+04	0,T	1.0E+04	0,T	1.0E+04	О,Т	NA	3.6E+02	8.9E+02
Aliphatics >C8-C10	NA	1.2E+03	z	8.8E+03	z	5.3E+03	A	5.3E+03	X DF2	1.0E+04	0,T	1.0E+04	О,Т	NA	8.6E+01	2.1E+02
Aliphatics >C10-C12	NA	2.3E+03	Z	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	0,T	NA	4.6E+02	1.1E+03
Aliphatics >C12-C16	NA	3.7E+03	N	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	0,T	1.0E+04	0,T	1.0E+04	0,T	NA	2.1E+03	5.2E+03
Aliphatics >C16-C35	NA	1.0E+04	0,T	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	0,T	NA		
Aromatics >C8-C10	AN	6.5E+02	z	5.1E+03	z	6.5E+01	٩	6.5E+01	X DF2	2.6E+02	X DF3	6.1E+03	X DF3	NA	1.5E+02	3.6E+02
Aromatics >C10-C12	NA	1.2E+03	z	1.0E+04	0,T	1.0E+02	٩	1.0E+02	X DF2	4.1E+02	X DF3	9.6E+03	X DF3	AN	7.8E+02	1.9E+03
Aromatics >C12-C16	NA	1.8E+03	z	1.0E+04	0,T	2.0E+02	A	2.0E+02	X DF2	8.1E+02	X DF3	1.0E+04	0,T	NA	4.1E+03	1.0E+04

NOTE: See end of Table for designation of letter symbols and footnotes.

COMPOUND	CAS#	SOILni	NOTE	SOILi	NOTE	SOILGW1	NOTE	SOILGW2	NOTE	SOILGW3DW	NOTE	SOILGW3NDW	NOTE	SOILsat	SOILesni*	SOILesi*
Aromatics >C16-C21	NA	1.5E+03	z	1.0E+04	0,T	2.1E+03	A	2.1E+03	X DF2	1.9E+03	X DF3	1.0E+04	0,T	NA		
Aromatics >C21-C35	NA	1.8E+03	z	1.0E+04	0,T	1.0E+04	0,T	1.0E+04	О,Т	1.0E+04	0,T	1.0E+04	0,T	NA		
TPH-GRO	AA	6.5E+02	N,I	5.1E+03	Ľ,	6.5E+01	۷	6.5E+01	X DF2	2.6E+02	X DF3	6.1E+03	X DF3	NA	8.6E+01	2.1E+02
TPH-DRO	NA	6.5E+02	N,I	5.1E+03	Γ,Γ	6.5E+01	A	6.5E+01	X DF2	2.6E+02	X DF3	6.1E+03	X DF3	NA		
TPH-ORO	NA	1.8E+03	N,I	1.0E+04	0,Т	1.0E+04	0,T	1.0E+04	О,Т	1.0E+04	0,Т	1.0E+04	0,T	NA		
A - Based on algorithm contained in	Appendix F	г														
3 - Based on EPA's biokinetic and a	dult lead cle	eanup level m	nodels for	lead												
C - Based on carcinogenic health efi	fects															
D - DEQ established background lev	rel plus one	standard dev	viation = 1	1.5												
^T - GW 2 soil water partition equatio	n multiplied	1 by maximum	n DF is les	s than SoilGV	V1 thus d	efault to SoilG	3W 1									
3 - GW 3 soil water partition equatio	in multiplied	d by maximum	n DF is les	ss than SoilG	W2 thus a	lefault to Soil	3W 2 and	I multiply by >	K DF 2							
H - GW 3 soil water partition equatio	n multipliec	d by maximum	1 DF is les	ss than SoilGV	N2 thus d	efault to GW.	2 and do	not multiply b	oy DF 2							
1 - TPH Standards are only applicabl	e when use	ed in conjuncti	ion with S	tandards for i	indicator c	spunodwoc										
Soil level protective of groundwar	ter for inorg	panic constitue	ents base	d on leachabil	lity (TCLF	risted) د										
-1 - Soil level protective of groundwa	ater for inor	rganic constitu	lents base	ed on GW 1 b	ecause T	CLP value no	it listed									
V - Based on non-carcinogenic heal	th effects															
VA - Not applicable																
O - Ceiling value based on aesthetic	considerat	tions														
2 - Based on analytical quantitation	limit															
S - Soil level protective of groundwa	ter for inorg	janic constitu€	ents base	d on the maxi	mum con	centration for	the benet	ficial use of s	ewage slu	idge						
T - TPH shall not exceed 10,000																
X DF 2 - Multiply SOILGW2 by the a	ppropriate :	site specific D	DF from th	e chart												
X DF 3 - Multiply SOILGW3DW or S	OILGW3NE	DW by the apt	propriate :	site specific D	F from th	e chart										
* The MO-1 SOILes is presented for	screening ₁	purposes only	y; if the so	il AOIC excet	eds the M	0-1 SOILes, 1	then furth	er assessmel	nt maybe	warranted und	der MO-2	or MO-3.				

LDEQ RECAP TABLE 2 MANAGEMENT OPTION 1 STANDARDS FOR SOIL (mg/kg)

NOTE: See end of Table for designation of letter symbols and footnotes.

LDEQ RECAP TABLE 3 MANAGEMENT OPTION 1, 2, AND 3 STANDARDS FOR GROUNDWATER (mg/l)

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COMPOUND	CAS #	GW 1	NOTE	GW 2	NOTE	GW 3 DW	NOTE	GW 3 NDW	NOTE	S	Gwesni*	Gwesi*	Gwairni*	Gwairi*
Acenaphthene	83-32-9	3.7E-01	z	3.7E-01	X DF 2	4.3E-01	X DF 3	5.4E-01	X DF 3	4.2E+00	2.8E+03	9.6E+03	1.7E+05	2.4E+05
Acenaphthylene	208-96-8	3.7E-01	z	3.7E-01	X DF 2	5.6E-01	X DF 3	7.7E-01	X DF 3	1.6E+01	3.6E+03	1.2E+04	2.1E+05	3.0E+05
Acetone	67-64-1	6.1E-01	z	6.1E-01	X DF 2	3.3E+00	X DF 3	7.2E+01	X DF 3	1.0E+06	5.8E+03	2.0E+04	3.5E+05	4.8E+05
Aldrin	309-00-2	1.9E-03	ø	1.9E-03	ш	1.9E-03	G	1.9E-03	ს	1.8E-01				
Aniline	62-53-3	1.2E-02	ပ	1.2E-02	X DF 2	5.7E-03	X DF 3	8.0E-02	X DF 3	3.6E+04				
Anthracene	120-12-7	1.8E+00	z	1.8E+00	X DF 2	1.1E-01	X DF 3	1.1E-01	X DF 3	4.3E-02	3.7E+04	1.3E+05	1.0E+06	1.0E+06
Antimony	7440-36-0	6.0E-03	MCL	6.0E-03	X DF 2	6.0E-03	X DF 3	2.6E-01	X DF 3	AN				
Arsenic	7440-38-2	1.0E-02	MCL	1.0E-02	X DF 2	5.0E-02	X DF 3	5.0E-02	X DF 3	NA				
Barium	7440-39-3	2.0E+00	MCL	2.0E+00	X DF 2	2.0E+00	X DF 3	4.5E+01	X DF 3	AN				
Benzene	71-43-2	5.0E-03	MCL	5.0E-03	X DF 2	1.1E-03	X DF 3	1.3E-02	X DF 3	1.8E+03	2.9E+00	7.2E+00	3.9E+02	3.9E+02
Benz(a)anthracene	56-55-3	7.8E-03	a	9.1E-05	X DF 2	3.8E-07	X DF 3	3.8E-07	X DF 3	9.4E-03				
Benzo(a)pyrene	50-32-8	2.0E-04	MCL	2.0E-04	X DF 2	2.0E-04	X DF 3	2.0E-04	X DF 3	1.6E-03				
Benzo(b)fluoranthene	205-99-2	4.8E-03	ø	9.1E-05	X DF 2	9.1E-05	т	9.1E-05	т	1.5E-03				
Benzo(k)fluoranthene	207-08-9	2.5E-03	a	9.1E-04	X DF 2	9.1E-04	т	9.1E-04	т	8.0E-04				
Beryllium	7440-41-7	4.0E-03	MCL	4.0E-03	X DF 2	4.0E-03	X DF 3	3.0E-01	X DF 3	NA				
Biphenyl,1,1-	92-52-4	3.0E-01	z	3.0E-01	X DF 2	2.3E-01	X DF 3	2.7E-01	X DF 3	7.5E+00	1.7E+02	4.2E+02	1.1E+04	1.1E+04
Bis(2-chloroethyl)ether	111-44-4	5.7E-03	Ø	5.7E-03	ц	2.8E-05	X DF 3	2.1E-04	X DF 3	1.7E+04	1.5E+01	3.7E+01	8.8E+02	8.8E+02
Bis(2-chloroisopropyl)ether	108-60-1	5.7E-03	a	2.7E-04	X DF 2	3.1E-04	X DF 3	8.3E-04	X DF 3	1.7E+03	2.4E+00	1.3E+01	1.4E+02	3.1E+02
Bis(2-ethyl-hexyl)phthalate	117-81-7	6.0E-03	MCL	6.0E-03	X DF 2	6.0E-03	X DF 3	6.0E-03	X DF 3	3.4E-01				
Bromodichloromethane	75-27-4	1.0E-01	MCL	1.0E-01	X DF 2	1.0E-01	т	3.3E-03	X DF 3	6.7E+03	2.1E-01	1.1E+00	1.4E+01	3.0E+01
Bromoform	75-25-2	1.0E-01	MCL	1.0E-01	X DF 2	3.9E-03	X DF 3	3.5E-02	X DF 3	3.1E+03	1.8E+01	9.5E+01	1.1E+03	2.3E+03
Bromomethane	74-83-9	1.0E-02	ø	8.7E-03	X DF 2	4.5E-02	X DF 3	5.3E-01	X DF 3	1.5E+04	1.3E+00	4.5E+00	1.5E+02	2.1E+02
Butyl benzyl phthalate	85-68-7	7.3E+00	z	7.3E+00	X DF 2	9.1E-01	X DF 3	1.0E+00	X DF 3	2.7E+00				
Cadmium	7440-43-9	5.0E-03	MCL	5.0E-03	X DF 2	1.0E-02	X DF 3	1.0E-02	X DF 3	NA				
Carbon Disulfide	75-15-0	1.0E+00	z	1.0E+00	X DF 2	2.8E+00	X DF 3	1.5E+01	X DF 3	1.2E+03	5.3E+00	1.3E+01	1.3E+03	1.3E+03
Carbon Tetrachloride	56-23-5	5.0E-03	MCL	5.0E-03	X DF 2	2.2E-04	X DF 3	1.2E-03	X DF 3	7.9E+02	6.1E-01	1.5E+00	1.4E+02	1.4E+02
Chlordane	57-74-9	2.0E-03	MCL	2.0E-03	X DF 2	2.0E-03	т	2.0E-03	т	5.6E-02				
Chloroaniline,p-	106-47-8	1.5E-01	z	1.5E-01	X DF 2	1.2E-01	X DF 3	6.7E-01	X DF 3	5.3E+03				
Chlorobenzene	108-90-7	1.0E-01	MCL	1.0E-01	X DF 2	1.0E-01	X DF 3	7.1E-01	X DF 3	4.7E+02	4.4E+02	1.1E+03	4.9E+04	4.9E+04
Chlorodibromomethane	124-48-1	1.0E-01	MCL	1.0E-01	X DF 2	3.9E-04	X DF 3	5.1E-03	X DF 3	2.6E+03	4.5E-01	2.4E+00	2.8E+01	5.9E+01
Chloroethane (Ethylchloride)	75-00-3	1.0E-02	ø	3.8E-03	X DF 2	1.3E+01	X DF 3	1.2E+02	X DF 3	5.7E+03	5.1E+03	1.3E+04	1.1E+06	1.1E+06
Chloroform	67-66-3	1.0E-01	MCL	1.0E-01	X DF 2	5.3E-03	X DF 3	7.0E-02	X DF 3	7.9E+03	1.3E+00	3.1E+00	1.5E+02	1.5E+02
Chloromethane	74-87-3	1.0E-02	ø	1.5E-03	X DF 2	2.5E-03	X DF 3	3.7E-02	X DF 3	5.3E+03	9.0E+00	2.2E+01	1.9E+03	1.9E+03
Chloronaphthalene,2-	91-58-7	4.9E-01	z	4.9E-01	X DF 2	3.2E-01	X DF 3	3.6E-01	X DF 3	1.2E+01	2.3E+03	8.0E+03	1.4E+05	2.0E+05
Chlorophenol,2-	95-57-8	3.0E-02	z	3.0E-02	X DF 2	1.0E-04	X DF 3	1.3E-01	X DF 3	2.2E+04	8.2E+01	2.8E+02	5.2E+03	7.2E+03

NOTE: See end of Table for designation of letter symbols and footnotes.

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COMPOUND	CAS#	GW 1	NOTE	GW 2	NOTE	GW 3 DW	NOTE	GW 3 NDW	NOTE	S	Gwesni*	Gwesi*	Gwairni*	Gwairi*
Chromium(III)	16065-83-1	1.0E-01	MCL	1.0E-01	X DF 2	5.0E-02	X DF 3	9.6E+02	X DF 3	NA				
Chromium(VI)	18540-29-97	1.0E-01	MCL	1.0E-01	X DF 2	5.0E-02	X DF 3	1.9E+00	X DF 3	NA				
Chrysene	218-01-9	9.1E-03	ပ	9.1E-03	X DF 2	3.8E-05	X DF 3	3.8E-05	X DF 3	1.6E-03				
Cobalt	7440-48-4	2.2E+00	z	2.2E+00	X DF 2	2.0E+00	X DF 3	3.9E+01	X DF 3	NA				
Copper	7440-50-8	1.3E+00	MCL	1.3E+00	X DF 2	1.0E+00	X DF 3	1.3E+00	X DF 3	NA				
Cyanide (free)	57-12-5	2.0E-01	MCL	2.0E-01	X DF 2	6.6E-01	X DF 3	1.3E+01	X DF 3	NA				
DDD	72-54-8	2.8E-04	ပ	2.8E-04	X DF 2	2.8E-04	т	2.8E-04	т	9.0E-02				
DDE	72-55-9	2.0E-04	ပ	2.0E-04	X DF 2	2.0E-04	т	2.0E-04	т	1.2E-01				
DDT	50-29-3	3.0E-04	a	2.0E-04	X DF 2	2.0E-04	т	2.0E-04	т	2.5E-02				
Dibenz(a,h)anthracene	53-70-3	2.5E-03	σ	9.1E-06	X DF 2	9.1E-06	т	9.1E-06	т	2.5E-03				
Dibenzofuran	132-64-9	2.4E-02	z	2.4E-02	X DF 2	1.4E-02	X DF 3	1.5E-02	X DF 3	3.1E+00	1.6E+03	5.6E+03	9.6E+04	1.3E+05
Dibromo-3-chloropropane,1,2-	96-12-8	2.0E-04	MCL	2.0E-04	X DF 2	2.0E-04	X DF 3	2.0E-04	X DF 3	1.2E+03				
Dichlorobenzene, 1, 2-	95-50-1	6.0E-01	MCL	6.0E-01	X DF 2	6.0E-01	X DF 3	3.4E+00	X DF 3	1.6E+02	1.6E+02	5.5E+02	1.4E+04	2.0E+04
Dichlorobenzene, 1, 3-	541-73-1	1.0E-02	σ	5.5E-03	X DF 2	1.8E-02	X DF 3	4.5E-02	X DF 3	1.3E+02	1.7E+00	5.8E+00	1.8E+02	2.5E+02
Dichlorobenzene,1,4-	106-46-7	7.5E-02	MCL	7.5E-02	X DF 2	7.5E-02	X DF 3	7.5E-02	X DF 3	7.4E+01	8.8E+02	2.2E+03	8.4E+04	8.4E+04
Dichlorobenzidine, 3, 3-	91-94-1	2.0E-02	a	1.5E-04	X DF 2	1.3E-05	X DF 3	1.5E-05	X DF 3	3.1E+00				
Dichloroethane, 1, 1-	75-34-3	8.1E-01	z	8.1E-01	X DF 2	3.0E+00	X DF 3	1.9E+01	X DF 3	5.1E+03	1.4E+02	4.9E+02	1.7E+04	2.4E+04
Dichloroethane, 1, 2-	107-06-2	5.0E-03	MCL	5.0E-03	X DF 2	3.6E-04	X DF 3	6.8E-03	X DF 3	8.5E+03	3.6E+00	8.9E+00	2.8E+02	2.8E+02
Dichloroethene, 1, 1-	75-35-4	7.0E-03	MCL	7.0E-03	X DF 2	5.0E-05	X DF 3	5.8E-04	X DF 3	2.3E+03	1.8E+01	6.2E+01	4.0E+03	5.6E+03
Dichloroethene, cis, 1, 2-	156-59-2	7.0E-02	MCL	7.0E-02	X DF 2	7.0E-02	X DF 3	1.7E+00	X DF 3	3.5E+03	1.3E+01	4.5E+01	1.3E+03	1.9E+03
Dichloroethene, trans, 1, 2-	156-60-5	1.0E-01	MCL	1.0E-01	X DF 2	1.0E-01	X DF 3	2.5E+00	X DF 3	6.3E+03	1.4E+01	4.7E+01	1.9E+03	2.6E+03
Dichlorophenol,2,4-	120-83-2	1.1E-01	z	1.1E-01	X DF 2	3.0E-04	X DF 3	2.3E-01	X DF 3	4.5E+03				
Dichloropropane, 1, 2-	78-87-5	5.0E-03	MCL	5.0E-03	X DF 2	5.0E-03	X DF 3	5.0E-03	X DF 3	2.8E+03	4.0E+03	9.8E+03	4.0E+05	4.0E+05
Dichloropropene, 1, 3-	542-75-6	5.0E-03	ø	3.9E-04	X DF 2	9.9E-03	X DF 3	1.6E-01	X DF 3	2.8E+03	9.3E+01	2.3E+02	7.4E+03	7.4E+03
Dieldrin	60-57-1	2.5E-03	a	2.5E-03	ш	2.5E-03	ი	2.5E-03	ი	2.0E-01				
Diethylphthalate	84-66-2	2.9E+01	z	2.9E+01	X DF 2	1.3E+01	X DF 3	2.3E+01	X DF 3	1.1E+03				
Dimethylphenol,2,4-	105-67-9	7.3E-01	z	7.3E-01	X DF 2	2.8E-01	X DF 3	4.5E-01	X DF 3	7.9E+03				
Dimethylphthalate	131-11-3	3.7E+02	z	3.7E+02	X DF 2	2.2E+02	X DF 3	5.7E+02	X DF 3	4.0E+03				
Di-n-octylphthalate	117-84-0	1.5E+00	z	1.5E+00	X DF 2	6.4E-01	X DF 3	1.2E+00	X DF 3	2.0E-02				
Dinitrobenzene, 1, 3-	99-65-0	1.0E-02	ø	3.7E-03	X DF 2	3.1E-03	X DF 3	2.8E-02	X DF 3	5.3E+02				
Dinitrophenol,2,4-	51-28-5	7.3E-02	z	7.3E-02	X DF 2	6.1E-02	X DF 3	5.0E-01	X DF 3	2.8E+03				
Dinitrotoluene,2,6-	606-20-2	3.7E-02	z	3.7E-02	X DF 2	2.9E-02	X DF 3	1.7E-01	X DF 3	1.8E+02				
Dinitrotoluene,2,4-	121-14-2	7.3E-02	z	7.3E-02	X DF 2	5.6E-02	X DF 3	2.9E-01	X DF 3	2.7E+02				
Dinoseb	88-85-7	7.0E-03	MCL	7.0E-03	X DF 2	7.0E-03	X DF 3	2.5E-02	X DF 3	5.2E+01				
Endosulfan	115-29-7	2.2E-01	z	2.2E-01	X DF 2	2.2E-01	т	6.4E-04	X DF 3	5.1E-01				

NOTE: See end of Table for designation of letter symbols and footnotes.
Spill and Emergency
Response

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LDEQ RECAP TABLE 3 MANAGEMENT OPTION 1, 2, AND 3 STANDARDS FOR GROUNDWATER (mg/l)

COMPOUND	CAS#	GW 1	NOTE	GW 2	NOTE	GW 3 DW	NOTE	GW 3 NDW	NOTE	S	Gwesni*	Gwesi*	Gwairni*	Gwairi*
Endrin	72-20-8	2.0E-03	MCL	2.0E-03	X DF 2	2.6E-04	X DF 3	2.6E-04	X DF 3	2.5E-01				
Ethyl benzene	100-41-4	7.0E-01	MCL	7.0E-01	X DF 2	2.4E+00	X DF 3	8.1E+00	X DF 3	1.7E+02	2.3E+03	5.7E+03	3.6E+05	3.6E+05
Fluoranthene	206-44-0	1.5E+00	z	1.5E+00	X DF 2	3.1E-02	X DF 3	3.2E-02	X DF 3	2.1E-01				
Fluorene	86-73-7	2.4E-01	z	2.4E-01	X DF 2	7.4E-02	X DF 3	7.8E-02	X DF 3	2.0E+00	4.5E+03	1.6E+04	2.7E+05	3.8E+05
Heptachlor	76-44-8	4.0E-04	MCL	4.0E-04	X DF 2	4.0E-04	т	4.0E-04	н	1.8E-01				
Heptachlor epoxide	1024-57-3	2.0E-04	MCL	2.0E-04	X DF 2	2.0E-04	X DF 3	2.0E-04	X DF 3	2.0E-01				
Hexachlorobenzene	118-74-1	1.0E-03	MCL	1.0E-03	X DF 2	1.0E-03	т	1.0E-03	т	6.2E+00	2.7E-01	6.7E-01	2.2E+01	2.2E+01
Hexachlorobutadiene	87-68-3	8.5E-04	ပ	8.5E-04	X DF 2	9.0E-05	X DF 3	1.1E-04	X DF 3	3.2E+00				
Hexachlorocyclohexane, alpha	319-84-6	3.0E-05	ø	1.1E-05	X DF 2	1.8E-06	X DF 3	2.6E-06	X DF 3	2.0E+00				
Hexachlorocyclohexane, beta	319-85-7	6.0E-05	ø	3.7E-05	X DF 2	4.9E-06	X DF 3	6.5E-06	X DF 3	2.4E-01				
Hexachlorocyclohexane,gamma	58-89-9	2.0E-04	MCL	2.0E-04	X DF 2	1.1E-04	X DF 3	2.0E-04	X DF 3	6.8E+00				
Hexachlorocyclopentadiene	77-47-4	5.0E-02	MCL	5.0E-02	X DF 2	5.0E-02	X DF 3	5.0E-02	X DF 3	1.8E+00	6.0E-02	2.1E-01	8.5E+00	1.2E+01
Hexachloroethane	67-72-1	1.0E-02	ø	7.9E-04	X DF 2	1.0E-03	X DF 3	1.7E-03	X DF 3	5.0E+00	2.2E+02	5.5E+02	1.4E+04	1.4E+04
Indeno(1,2,3-cd)pyrene	193-39-5	3.7E-03	Ø	9.1E-05	X DF 2	9.1E-05	т	9.1E-05	н	2.2E-05				
Isobutyl alcohol	78-83-1	1.1E+01	z	1.1E+01	X DF 2	9.8E+00	X DF 3	1.6E+02	X DF 3	8.5E+04				
Isophorone	78-59-1	7.0E-02	ပ	7.0E-02	X DF 2	3.3E-02	X DF 3	3.2E-01	X DF 3	1.2E+04				
Lead (inorganic)	7439-92-1	1.5E-02	MCL	1.5E-02	X DF 2	5.0E-02	X DF 3	5.0E-02	X DF 3	NA				
Mercury (inorganic)	7487-94-7	2.0E-03	MCL	2.0E-03	X DF 2	2.0E-03	X DF 3	2.0E-03	X DF 3	NA				
Methoxychlor	72-43-5	4.0E-02	MCL	4.0E-02	X DF 2	4.0E-02	X DF 3	4.0E-02	X DF 3	4.5E-02				
Methylene chloride	75-09-2	5.0E-03	MCL	5.0E-03	X DF 2	4.4E-03	X DF 3	8.7E-02	X DF 3	1.3E+04	9.8E+01	2.4E+02	9.0E+03	9.0E+03
Methyl ethyl ketone	78-93-3	1.9E+00	z	1.9E+00	X DF 2	2.0E+01	X DF 3	3.9E+02	X DF 3	2.2E+05	2.4E+05	5.9E+05	1.0E+06	1.0E+06
Methyl isobutyl ketone	108-10-1	2.0E+00	z	2.0E+00	X DF 2	2.6E+00	X DF 3	3.0E+01	X DF 3	1.9E+04	4.0E+04	9.9E+04	1.0E+06	1.0E+06
Methylnaphthalene,2-	91-57-6	6.2E-03	z	6.2E-03	X DF 2	2.6E-02	X DF 3	2.7E-02	X DF 3	2.5E+01	8.4E+01	2.9E+02	5.0E+03	7.0E+03
MTBE (methyl tert-butyl ether)	1634-04-4	2.0E-02	1/O	2.0E-02	X DF 2	2.0E-02	X DF 3	5.5E+02	X DF 3	5.1E+04	4.8E+03	1.7E+04	3.4E+05	4.7E+05
Naphthalene	91-20-3	1.0E-02	Ø	6.2E-03	X DF 2	1.7E-01	X DF 3	2.2E-01	X DF 3	3.1E+01	1.0E+01	3.5E+01	6.6E+02	9.3E+02
Nickel	7440-02-0	7.3E-01	z	7.3E-01	X DF 2	6.7E-01	X DF 3	1.3E+01	X DF 3	NA				
Nitrate	14797-55-8	1.0E+01	MCL	1.0E+01	X DF 2	1.0E+01	X DF 3	1.0E+03	X DF 3	NA				
Nitrite	14797-65-0	1.0E+00	MCL	1.0E+00	X DF 2	1.0E+00	X DF 3	6.4E+01	X DF 3	ΝA				
Nitroaniline,2-	88-74-4	5.0E-02	Ø	2.1E-04	X DF 2	8.7E-02	X DF 3	5.0E-01	X DF 3	1.3E+03	1.4E+00	4.7E+00	8.3E+01	1.2E+02
Nitroaniline,3-	99-09-2	5.0E-02	Ø	1.8E-02	X DF 2	9.4E-02	X DF 3	9.3E-01	X DF 3	1.2E+03	1.7E+03	5.9E+03	1.0E+05	1.4E+05
Nitroaniline,4-	100-01-6	1.1E-01	z	1.1E-01	X DF 2	9.4E-02	X DF 3	9.3E-01	X DF 3	7.3E+02				
Nitrobenzene	98-95-3	3.4E-03	z	3.4E-03	X DF 2	1.5E-02	X DF 3	9.6E-02	X DF 3	2.1E+03	4.3E+03	1.1E+04	2.6E+05	2.6E+05
Nitrophenol,4-	100-02-7	2.9E-01	z	2.9E-01	X DF 2	2.3E-01	X DF 3	1.3E+00	X DF 3	1.2E+04				
Nitrosodi-n-propylamine,n-	621-64-7	1.0E-02	Ø	1.0E-02	ц	1.0E-02	ŋ	4.4E-05	X DF 3	9.9E+03				
N-nitrosodiphenylamine	86-30-6	1.4E-02	с	1.4E-02	X DF 2	2.2E-03	X DF 3	3.2E-03	X DF 3	3.5E+01				

NOTE: See end of Table for designation of letter symbols and footnotes.

1.4E+04	1.4E+04	4.1E+02	1.7E+02	AN	X DF 3	3.1E+01	X DF 3	1.3E+00	X DF 2	3.4E-01	z	3.4E-01	NA	Aromatics >C12-C16
8.1E+03	8.1E+03	1.8E+02	7.1E+01	AN	X DF 3	3.1E+01	X DF 3	1.3E+00	X DF 2	3.4E-01	z	3.4E-01	NA	Aromatics >C10-C12
5.3E+03	5.3E+03	7.1E+01	2.9E+01	AN	X DF 3	3.1E+01	X DF 3	1.3E+00	X DF 2	3.4E-01	z	3.4E-01	AN	Aromatics >C8-C10
				AN	X DF 3	1.6E+03	X DF 3	6.7E+01	X DF 2	7.3E+01	z	7.3E+01	NA	Aliphatics >C16-C35
1.6E+02	1.6E+02	1.3E+00	5.3E-01	NA	X DF 3	7.9E+01	X DF 3	3.4E+00	X DF 2	1.4E+00	z	1.4E+00	NA	Aliphatics >C12-C16
7.0E+02	7.0E+02	5.5E+00	2.2E+00	AN	X DF 3	7.9E+01	X DF 3	3.4E+00	X DF 2	1.4E+00	z	1.4E+00	NA	Aliphatics >C10-C12
1.0E+03	1.0E+03	7.9E+00	3.2E+00	NA	X DF 3	7.9E+01	X DF 3	3.4E+00	X DF 2	1.3E+00	Z	1.3E+00	NA	Aliphatics >C8-C10
2.9E+04	2.9E+04	2.3E+02	9.2E+01	NA	X DF 3	3.9E+03	X DF 3	1.7E+02	X DF 2	3.2E+01	z	3.2E+01	NA	Aliphatics C6-C8
				NA	X DF 3	8.0E+00	X DF 3	5.0E+00	X DF 2	1.1E+01	z	1.1E+01	7440-66-6	Zinc
5.4E+03	3.9E+03	8.9E+01	2.6E+01	1.6E+02	X DF 3	1.0E+01	X DF 3	1.0E+01	X DF 2	1.0E+01	MCL	1.0E+01	1330-20-7	Xylene(mixed)
6.0E+01	6.0E+01	4.9E-01	2.0E-01	2.8E+03	X DF 3	3.6E-02	X DF 3	1.9E-03	X DF 2	2.0E-03	MCL	2.0E-03	75-01-4	Vinyl chloride
				AN	X DF 3	4.5E+00	X DF 3	2.3E-01	X DF 2	2.6E-01	N	2.6E-01	7440-62-2	Vanadium
				8.0E+02	X DF 3	8.2E-04	X DF 3	6.5E-04	X DF 2	6.0E-03	ð	1.0E-02	88-06-2	Trichlorophenol, 2, 4, 6-
				1.2E+03	X DF 3	6.4E-01	X DF 3	5.4E-01	X DF 2	3.7E+00	z	3.7E+00	95-95-4	Trichlorophenol, 2, 4, 5-
1.2E+04	8.7E+03	1.1E+02	3.1E+01	1.1E+03	X DF 3	2.0E+01	X DF 3	6.9E+00	X DF 2	1.3E+00	N	1.3E+00	75-69-4	Trichlorofluoromethane
1.7E+03	1.7E+03	2.5E+01	1.0E+01	1.1E+03	X DF 3	2.1E-02	X DF 3	2.8E-03	X DF 2	5.0E-03	MCL	5.0E-03	79-01-6	Trichloroethene
6.2E+02	6.2E+02	2.1E+01	8.4E+00	4.4E+03	X DF 3	6.9E-03	X DF 3	5.6E-04	X DF 2	5.0E-03	MCL	5.0E-03	79-00-5	Trichloroethane, 1, 1, 2-
3.7E+04	2.7E+04	4.6E+02	1.3E+02	1.3E+03	X DF 3	9.1E+00	X DF 3	2.0E-01	X DF 2	2.0E-01	MCL	2.0E-01	71-55-6	Trichloroethane, 1, 1, 1-
4.3E+04	3.1E+04	1.6E+03	4.5E+02	3.0E+02	X DF 3	1.9E-01	X DF 3	7.0E-02	X DF 2	7.0E-02	MCL	7.0E-02	120-82-1	Trichlorobenzene,1,2,4-
				7.4E-01	т	3.0E-03	т	3.0E-03	X DF 2	3.0E-03	MCL	3.0E-03	8001-35-2	Toxaphene
1.3E+04	1.3E+04	2.2E+02	8.9E+01	5.3E+02	X DF 3	4.6E+01	X DF 3	6.1E+00	X DF 2	1.0E+00	MCL	1.0E+00	108-88-3	Toluene
				AN	X DF 3	2.0E-03	X DF 3	2.0E-03	X DF 2	2.0E-03	MCL	2.0E-03	7440-28-0	Thallium
				1.0E+03	X DF 3	1.8E-01	X DF 3	1.5E-01	X DF 2	1.1E+00	z	1.1E+00	58-90-2	Tetrachlorophenol,2,3,4,6-
3.0E+03	3.0E+03	3.6E+01	1.5E+01	2.0E+02	X DF 3	2.5E-03	X DF 3	6.5E-04	X DF 2	5.0E-03	MCL	5.0E-03	127-18-4	Tetrachloroethylene
4.1E+02	4.1E+02	1.5E+01	6.2E+00	3.0E+03	X DF 3	1.8E-03	X DF 3	1.6E-04	X DF 2	5.5E-05	σ	5.0E-04	79-34-5	Tetrachloroethane,1,1,2,2-
6.9E+00	6.9E+00	1.8E-01	7.2E-02	1.1E+03	X DF 3	2.2E-03	X DF 3	8.4E-04	X DF 2	4.3E-04	a	5.0E-03	630-20-6	Tetrachloroethane,1,1,1,2-
				6.0E-01	X DF 3	5.7E-04	X DF 3	5.4E-04	X DF 2	1.1E-02	z	1.1E-02	95-94-3	Tetrachlorobenzene, 1, 2, 4, 5-
5.4E+04	5.4E+04	1.3E+03	5.4E+02	3.1E+02	X DF 3	7.1E+00	X DF 3	1.0E-01	X DF 2	1.0E-01	MCL	1.0E-01	100-42-5	Styrene
				AN	X DF 3	5.4E-01	X DF 3	1.3E-01	X DF 2	1.8E-01	z	1.8E-01	7440-22-4	Silver
				AN	X DF 3	5.0E-02	X DF 3	5.0E-02	X DF 2	5.0E-02	MCL	5.0E-02	7782-49-2	Selenium
9.5E+05	6.8E+05	4.0E+04	1.2E+04	1.4E-01	X DF 3	1.4E+00	X DF 3	6.1E-01	X DF 2	1.8E-01	z	1.8E-01	129-00-0	Pyrene
				3.1E-02	т	5.0E-04	т	5.0E-04	X DF 2	5.0E-04	MCL	5.0E-04	1336-36-3	Polychlorinated biphenyls
1.0E+06	1.0E+06	1.0E+06	1.3E+05	8.3E+04	X DF 3	8.3E+01	X DF 3	9.3E+00	X DF 2	1.8E+00	z	1.8E+00	108-95-2	Phenol
1.0E+06	1.0E+06	2.5E+05	7.3E+04	1.2E+00	X DF 3	2.1E-01	X DF 3	2.0E-01	X DF 2	1.8E+00	z	1.8E+00	85-01-8	Phenanthrene
				2.0E+03	X DF 3	1.0E-03	X DF 3	1.0E-03	X DF 2	1.0E-03	MCL	1.0E-03	87-86-5	Pentachlorophenol
Gwairi*	Gwairni*	Gwesi*	Gwesni*	S	NOTE	GW 3 NDW	NOTE	GW 3 DW	NOTE	GW 2	NOTE	GW 1	CAS#	COMPOUND

NOTE: See end of Table for designation of letter symbols and footnotes.
Spill and Emergency
Response

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Spill and Emergency Response

LDEQ RECAP TABLE 3 MANAGEMENT OPTION 1, 2, AND 3 STANDARDS FOR GROUNDWATER (mg/l)

COMPOUND	CAS #	GW 1	NOTE	GW 2	NOTE	GW 3 DW	NOTE	GW 3 NDW	NOTE	S	Gwesni*	Gwesi*	Gwairni*	Gwairi*
Aromatics >C16-C21	NA	1.1E+00	z	1.1E+00	X DF 2	1.0E+00	X DF 3	2.4E+01	X DF 3	AA				
Aromatics >C21-C35	NA	1.1E+00	z	1.1E+00	X DF 2	1.0E+00	X DF 3	2.4E+01	X DF 3	AA				
TPH-GRO	NA	3.4E-01	Ϊ	3.4E-01	X DF2	1.3E+00	X DF3	3.1E+01	X DF3	AA	3.2E+00	7.9E+00	1.0E+03	1.0E+03
TPH-DRO	NA	3.4E-01	N,I	3.4E-01	X DF2	1.0E+00	X DF3	2.4E+01	X DF3	AA				
TPH-ORO	NA	1.1E+00	N,I	1.1E+00	X DF2	1.0E+00	X DF3	2.4E+01	X DF3	NA				
C - Based on carcinogenic h	ealth effects	s												
F - GW 2 multiplied by maxir	num DF is l	ess than GW	/ 1 thus d	efault to GW	-									
G - GW 3 multiplied by maxi	mum DF is I	less than GM	V 2 thus d	efault to GW	2 and dc	not multiply	by DF 2							
H - GW 3 multiplied by maxin	mum DF is I	less than GM	/ 2 thus d	efault to GW	2 and mi	ultiply by DF	2							
I - TPH Standards are only a	pplicable w	hen used in (conjunctic	on with Stand	lards for i	ndicator con	spunodu							
MCL - Based on EPA's Maxi	mum Conta	Iminant Leve	I (MCL) fc	or drinking we	ater									
N - Based on non-carcinoge	nic health et	ffects												
NA - Not applicable														
Q - Based on analytical quar	ntitation limit													
X DF 2 - Multiply GW 2 by th	le appropria	ite site specif	ic dilution	factor from t	the chart									
X DF 3 - Multiply GW 3 DW	or GW 3 ND	JW by the ap	propriate	site specific (dilution fa	actor from the	e chart							
T/O - EPA taste/odor adviso	ry value													
* The MO-1 GWes and MO-1 G	Nair are prest	ented for scree	sning purpc	ses only; if the	S CC excet	eds the MO-1	GWes and	I/or MO-1 GW	air, then furth	ner assessm	ent maybe warra	aned under MC)-2 or MO-3.	



Agenda

- Predevelopment Surface Rights Issues in the Renewable Space
 Seth Levine
- Rights for CO₂ Sequestration: Public versus Private Justin Marocco
- Offshore Wind Leasing Framework
 Sarah Dicharry
- Q&A



Predevelopment Surface Rights Issues in the Renewable Space

Site Acquisition Structures

Lease/Fee Structures often include explicit or implicit servitude/easement grants

- Lease (which often includes servitudes for access and negative servitudes regarding blocking access to sunlight)
 - May impact form of lease and recordation requirements in Louisiana.
 - In Louisiana, lease term is limited to 99 years.
- Option to lease/acquire fee/ acquire servitude
 - In Louisiana, options may only be granted for 10 years.
- Fee acquisition
- Servitude acquisition



Fee Simple – Complete Ownership Louisiana

- Fee Simple is the most basic type of ownership. The owner controls the surface, the subsurface and the air above a property. The owner also has the freedom to sell, lease, gift or bequest these rights individually or entirely to others.
- Sale of land involves the minerals unless the minerals are reserved. "A conveyance of land carries with it all incidents of ownership including mineral rights, except such rights as may be reserved." Sheridan v. Cassel, 70 So. 3d 89 (La. Ct. App. 2011).



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Fee Simple – Complete Ownership Louisiana

Not all interests in real property are readily apparent upon visual inspection

- Horizontal drilling has changed the landscape
- Servitudes / easements
- Surface use agreements
- Ownership of mineral rights
- Access to a public right-of-way



Surface Rights – Mineral Rights Louisiana

- In most states, the mineral estate is a separate interest in land that can be severed from the surface estate.
- In Louisiana, a similar result is achieved through the concept of the mineral servitude which is not a separate estate.
- In most jurisdictions, the mineral estate dominates, that is the surface estate exists for the benefit and use of the mineral owner. This is not the case in Louisiana, where unless otherwise agreed to, both the mineral owners and the surface owners have the right to use the surface of the property for their respective issues.
- This is the doctrine of Correlative Rights found at Mineral Code Article 11.



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Exception to Mineral Reservation Rule

As with any state, all land in Louisiana was once owned by a sovereign government before it became privately owned. In our case, ownership of any particular tract of land in Louisiana can be traced back to either France, Spain, the United States, or the State of Louisiana. Land was sold by the various sovereigns to settlers over time.



Exception to Mineral Reservation Rule

- The grants from the United States or the State of Louisiana, as recent as 1812, were typically effected by issuance of a patent from the state or federal government.
- According to LA Const. art. IX, sec. 4 (A), the sale of state lands will automatically
 effect a reservation of mineral rights. Subsection (B) goes on to state that "lands
 and mineral interests of the state, of a school board, or of a levee district shall not
 be lost by prescription." This provision was first adopted by the Louisiana
 Constitution in 1921.
- <u>As of 1921, all land patented by Louisiana reserved the mineral rights by operation</u> <u>of law.</u> Because prescription doesn't run against the state, any minerals under lands patented by the state after 1921 are owned perpetually by the state.
- Further, as a general rule any mineral interest ever owned by the state after 1921, no matter how it was acquired, will belong to the State forever. This is true even if the state sells the property and fails to reserve the minerals.



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Surface Impacts Generally

- Mineral agreements whether it be through mineral reservation or mineral lease, grant ownership rights to the surface unless there is an agreement to the contrary.
- Split/Severed Estates
 - Not all surface owners own the corresponding oil and gas rights.
 - Co-ownership of minerals/leases
 - Presents title issues in locating mineral owner where mineral estate severed long ago.



Exceptions to the Rule on Surface Use

- Automatic Reverter Only Louisiana does not require Landowner action.
 - · Occurs when the fee estate and mineral estate reunite
 - · Sometimes automatic after the lack of non-use
 - · Generally requires some action by the landowner
- While most people believe that Louisiana is the only jurisdiction that has laws that automatically, upon the satisfaction of certain conditions, reunite the mineral ownership with the surface estate, there are other jurisdictions that allow for a similar result.



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Exceptions to the Rule on Surface Use

Louisiana Laws - RS 31:27 — Modes of extinction of mineral servitudes

- A mineral servitude is extinguished by:
 - prescription resulting from nonuse for ten years;
 - confusion;
 - renunciation of the servitude on the part of him to whom it is due, or the express remission of his right;
 - expiration of the time for which the servitude was granted, or the happening of the dissolving condition attached to the servitude; or
 - extinction of the right of him who established the servitude.
 - Acts 1974, No. 50, §1, eff. Jan. 1, 1975.



Exceptions to the Rule on Surface Use

Louisiana Law - RS 31:29 — How prescription of nonuse is interrupted

- The prescription of nonuse running against a mineral servitude is interrupted by good faith operations for the discovery and production of minerals. By good faith means that the operations must be
 - commenced with reasonable expectation of discovering and producing minerals in paying quantities at a particular point or depth,
 - · continued at the site chosen to that point or depth, and
 - conducted in such a manner that they constitute a single operation although actual drilling or mining is not conducted at all times.
 - Acts 1974, No. 50, §29, eff. Jan. 1, 1975.



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Contractual Provisions to Control Surface Use in Acquisition Documents

- Restrictions on view/sunlight obstruction within certain radius (360 degree horizontal and 180 degree vertical)
 - Not only on subject property, but adjacent property if owned by same landowner
- Prohibition to enter into future mineral leases without consent or without full waiver of surface rights (including directional drilling depth requirements) and require that surface right waivers be obtained from existing mineral holders/lessees
- · Restrictions on constructing new improvements
- Affirmative access rights



Elements of Surface Use Agreement/Waiver

- · Waiving surface rights altogether with directional drilling only
- Depth requirements
- Designated operation/drilling areas
- · Notice requirements before exercising surface rights
- · Restrictions on when surface rights may be exercised
- Environmental and other indemnities for matters caused by exercise of surface rights or oil and gas exploration activities



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Title Insurance - Generally

Title insurance involves the issuance of a single premium insurance policy promising that if the state of the title is other than as represented on the face of the policy, and if the insured suffers losses caused by recorded and unrecorded defects as a result of the difference, the insurer will reimburse the insured for that loss and any related legal expenses, up to the face amount of the policy.



Coverage

- Insurance against title to the estate or interest described in Schedule A being "otherwise than stated."
- Insurance against "any defect in or lien or encumbrance on such title."
- Insurance against lack of a right access.
- Insurance against an unmarketable title.



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Insurance Coverage available for minerals, access, and encroachments



Louisiana Endorsements

- Access and Entry ALTA 17-06
- Restrictions, Encroachments, Minerals Land Under Development ALTA 9.7-06 (Lender's Only)
- Covenants, Conditions & Restrictions Land Under Development ALTA 9.8-06 (Owner's)
- Minerals and Other Subsurface Substances Land Under Development Endorsement – ALTA 35.3-06 (Lender's and Owner's)



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Access and Entry Endorsement – ALTA 17-06

Insures against loss or damage sustained:

- If the land does not abut and have both actual and vehicular access to and from a designated street
- If the street is not physically open and publicly maintained
- If the insured has no right to use existing curb cuts or entries along that portion of the street abutting the land



Covenants Conditions and Restrictions – ALTA 9.8-06

Provides coverage for loss or damage to current and future improvements based on plans by reason of:

- · Violation of improvements and future improvements of enforceable covenants
- Enforced removal as a result of building setback violations
- A notice of a violation, recorded in the public records, of a covenant relating to environmental protection
- Schedule B exceptions are excluded from coverage.



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The REM Endorsement – ALTA 9

- Coverage for loss or damage to certain surface improvements through mineral development
- New ALTA Endorsements



2012 ALTA Endorsements - Minerals

- ALTA 9-06 (4-2-12) Series (and ALTA 9.7-06)
- ALTA 35-06 (4-2-12) Series
- CLTA 100.29 (06-08-12)



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ALTA 9-06 (4-2-12) and ALTA 9.7-06

- "Damage to an Improvement located on the Land, at Date of Policy:
- ...ii. Resulting from the future exercise of a right to use the surface of the Land for the extraction or development of minerals or any other subsurface substances excepted from the description of the land or excepted in Schedule B."
- ALTA 9.7-06 provides same coverage as above, but also includes future improvements based on plans.



ALTA 35-06 (4-2-12) Series (Under Development)

- The language of these specific 'mineral surface damage' endorsements is similar, but not identical, to the ALTA 9-06 language.
- The loss paragraph provides for: "... loss or damage sustained... by reason of the enforced removal or alteration of any Improvement resulting from the future exercise..."
 - Obtaining the ALTA Form 35-06 provides coverage for enforced removal or alteration of improvements as opposed to the broader category of "damage" insured against by the ALTA 9



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Scope of Engagement – Who is Engaging You?

Who is engaging you? Depending on your client, their goals may be different. It is critical that you understand those goals.

- Title Company: Needs information to make an underwriting decision.
- Lender: Usually wants no risk at all.
- Buyer: Wants to understand what is being bought and if there are any restrictions on the ability to utilize the surface of the property.
- Seller: Wants to know what rights are retained when developing minerals if there is a mineral reservation.
- Mineral Owner: Wants to know what is owned.
- Mineral Lessee: Wants to waive surface rights only, without additional restrictions and/or establish specific operation sites.



Rights for CO₂ Sequestration: Private versus Public

Rights Needed for CO₂ Sequestration Projects

- Surface rights
 - For the installation of surface facilities, pipelines, and other surface uses.
- Subsurface rights
 - Need rights to pore space for the limits of the reservoir in which the CO₂ will be stored or sequestered.



Who Has Right to Grant Subsurface Rights?

- In general, surface owner has right to grant subsurface storage rights.
- No jurisprudence in the CO₂ sequestration context.
 - But, cases in other contexts should apply by analogy.



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Who Has Right to Grant Subsurface Rights?

• *Miss. River Transmission Corp. v. Tabor*, 757 F.2d 662 (5th Cir. 1985)

- "The surface owner owns the right to use the surface lands and the reservoir underlying the land for storage purposes and must be compensated for the expropriation of these rights."
- S. Nat. Gas Co. v. Sutton, 406 So. 2d 669(La. App. 2d Cir. 1981)
 - "Surface ownership, however, includes the right to the use of the reservoir underlying the two acres for storage purposes."



Acquiring Necessary Private-Property Rights

- Acquisition of privately-held rights for a CO₂ project is a matter of Louisiana property law.
- Under Louisiana law, various types of avenues may be used to acquire the necessary rights for a CO₂ project, including ownership, servitude, or lease.
 - And, to the extent there are any holdouts, eminent domain can likely be used to secure any outstanding rights.



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Ownership

- Obtain outright ownership of the land itself for all or part of the acreage needed for the project.
 - Perpetual in duration.
 - Preferable when both surface and subsurface rights to a particular piece of property are required.
 - Safest option for ensuring long-term consolidation of mineral rights and surface rights.
- However, ownership is likely the most expensive option.



Servitude

- Acquire a servitude from the landowner(s) conveying rights of use to the surface and/or subsurface of the property needed for the project.
 - Subject to expiration after 10 years of non-use.
- Definition of use could be defined very broadly in a servitude agreement to include a laundry list "uses" (such as CO₂ injection, storage, sequestration, maintenance <u>or</u> testing).
 - Thereby essentially establishing the servitude for so long as CO₂ remains sequestered.



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Lease

- Acquire a lease from the landowner(s), which covers both surface and subsurface storage rights for all or part of the project.
 - Similar to a servitude in terms of provisions contained therein.
- Term may only last for 99 years in Louisiana.
 - A "perpetual" lease is not permitted.



Acquiring Necessary Rights on Public Land

- On public land, the State Mineral and Energy Board has been vested with all authority to grant the necessary State property interests required for CO₂ sequestration.
 - Essentially, obtaining the required surface and subsurface rights from the State is "one-stop shopping."
- There are two possible options for obtaining the rights required for CO2 sequestration on publicly-held State or local government property:
 - an operating agreement from the State Mineral and Energy Board, or
 - a lease from the State Mineral and Energy Board.

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Acquiring Necessary Rights on Public Land

- Two recent examples:
 - Air Products Blue Energy, LLC
 - Capio Sequestration, LLC
- Both were "Carbon-Dioxide Storage Agreements."
 - Operating Agreements pursuant to La. R.S. 30:209(4)(e)
- Both agreements with the State, acting through its authorized agent, the Louisiana State Mineral and Energy Board.



Operating Agreement with State of Louisiana

"Upon a two-thirds vote of the members of the State Mineral and Energy Board and after a public hearing conducted in the affected parish pursuant to R.S. 30:6, enter into operating agreements whereby the state receives a share of revenues from the storage of oil, natural gas, liquid or liquefied hydrocarbons, or carbon dioxide, in whole or in part, as may be agreed upon by the parties, and assumes all or a portion of the risk of the cost of the activity in those situations where the board determines it is in the best interest of the state either in equity or in the promotion of conservation to do so, such as but not limited to the following illustrations:

* * *

(ii) Establishing a hydrocarbon or carbon dioxide storage facility in an underground reservoir."

La. R.S. § 30:209(4)



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Operating Agreement with State of Louisiana

- General procedure delineated in La. R.S. § 30:209.
- Permission is requested to engage in negotiations.
- It is placed on a public agenda, and then is acted on in by the State Mineral and Energy Board.
- Negotiations are undertaken.


Operating Agreement with State of Louisiana

- Public notice is given for a public hearing and the proposed agreement is made available for public inspection.
- A public hearing occurs.
- The transcript of the hearing along with any written comments is then prepared.



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Operating Agreement with State of Louisiana

- The Mineral and Energy Board votes on final approval of the agreement.
 - A two-thirds vote of approval by the board members is required.
- Once the above process is complete, the operating agreement is then executed.



Operating Agreement with State of Louisiana

- Not subject to the 25-year limitations as with leases
- Not subject to a public-bid requirement



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Lease with State of Louisiana

"For the purpose of injection, storage, transportation, shipment, and withdrawal of . . . carbon dioxide in any underground reservoir lying beneath such lands or water bodies, and beds thereof, and for other purposes necessary or incidental thereto, including drilling of any wells for injection, storage, or withdrawal of such product stored in such underground reservoir and the construction of houses for employees, warehouses, pipelines, separation and dehydration facilities, compressor stations, pump stations, loading stations, wharves, and docks."

La. R.S. § 30:148.2(2)



Lease with State of Louisiana

- Subject to a public-bid requirement.
- As a practical matter, no one has requested a lease and the State Mineral and Energy Board has not created a lease form.
 - But the general procedure set forth in La. R.S. § 30:148.3 -30:148.5
- To start process, the procedure calls for the lessee to submit a written application for a lease.
- Upon receipt of the application, the procedure calls for advertisement that a certain property is being nominated for public bid.

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Lease with State of Louisiana

- Bids publicly open on the date and time advertised to the public.
- The Board "may accept the bid or bids submitted that are determined to be the <u>most advantageous to the lessor</u> and may execute any lease granted under such terms and conditions as it may deem proper in accordance with the provisions of this Subpart."
 - The Board also has the "the right to reject all bids in its sole discretion."



Lease with State of Louisiana

- According to the statute, the following restrictions apply to leases with the Board:
 - In general, cannot cover an area larger than 640 acres
 - Lease term cannot exceed 25 years, with the ability to renew for an additional 25 years.
 - Lease must provide for "reasonable consideration," with may include, among other things, "bonus, rental, or consideration for injection or withdrawal of stored product."
 - "Any contract entered into for the lease of state lands for any purpose shall require that access by the public to public waterways through the state lands covered by the lease shall be maintained and preserved for the public by the lessee." La. R.S. § 30:148.3.

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Offshore Wind Leasing Framework

Current Focus on Offshore Wind

• Federal Administration's Focus on Offshore Wind

• E.O. 14008 (Jan. 27, 2021)

Sec. 207. Renewable Energy on Public Lands and in Offshore Waters. The Secretary of the Interior shall review siting and permitting processes on public lands and in offshore waters to identify to the Task Force steps that can be taken, consistent with applicable law, to increase renewable energy production on those lands and in those waters, with the goal of doubling offshore wind by 2030 while ensuring robust protection for our lands, waters, and biodiversity and creating good jobs. In conducting this review, the Secretary of the Interior shall consult, as appropriate, with the heads of relevant agencies, including the Secretary of Defense, the Secretary of Agriculture, the Secretary of Commerce, through the Administrator of the National Oceanic and Atmospheric Administration, the Secretary of Energy, the Chair of the Council on Environmental Quality, State and Tribal authorities, project developers, and other interested parties. The Secretary of the Interior shall engage with Tribal authorities regarding the development and management of renewable and conventional energy resources on Tribal lands.



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Current Focus on Offshore Wind, Cont'd

- Interagency Plan to Catalyze Offshore Wind Energy Development (Mar. 29, 2021)
 - Outlined a series of inititiaves to promote offshore wind
 - E.g.,
 - BOEM announced new Wind Energy Area New York Bight
 - BOEM announced plan to advance lease sales and approve Construction and Operations Plans
 - DOI, DOE, DOC announced shared goal to "deploy 30 gigawatts [] of offshore wind in the United States by 2030"
 - DOT announced a notice of funding opportunity

• BOEM approval of COP for Vineyard Wind (May 2021)

• First large-scale, commercial, offshore wind project approved in the U.S. (offshore Massachusetts)



Current Focus on Offshore Wind, Cont'd

• Feb. 23, 2022 - largest offshore wind lease sale to-date



Developments in the Gulf of Mexico

• June 2021 – GOM Intergovernmental Renewable Energy Task Force

• Partnership between federal, state, and local agencies focused on coordination regarding renewable energy activities on the OCS

• June 2021 – BOEM Request for Information

- Gauge interest in commercial wind leasing in the GOM
- Nov. 2021 BOEM call for information and nominations
 - Based on responses to the June 2021 RFI, BOEM concluded that competitive interest exists for GOM wind leasing

• Jan. 2022 –

- Announcement re draft EA for offshore wind leasing in the GOM
- MOU between BOEM and NOAA re OCS wind leasing



Statutory and Regulatory Authority for Offshore Wind Leasing

• 1953: Outer Continental Shelf Lands Act ("OCSLA") (43 U.S.C. 1331 et seq.)

- Tasks DOI with regulation of oil and gas development offshore
- 2005: Energy Policy Act ("EPAct") (Pub. L. No. 109-58)
 - Amended OCSLA to authorize DOI to issue regulations for development of energy from offshore sources other than oil and gas, including wind energy
 - DOI delegated that authority to BOEM

• 2009: 30 C.F.R. Part 585

• Govern development of energy from renewable sources offshore, including wind



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Regulatory Framework – Offshore Wind Leases

- General Regulatory Principles
 - E.g., in administering renewable leases offshore, BOEM must:
 - provide for safety, environmental protection, prevention of waste, conservation of resources, the national security interests of the U.S., etc. (**30 C.F.R. 585.102(a)**)
 - coordinate with relevant Federal, State, and local governments (*Id.*; see also id. at (e); see also 30 C.F.R. 585.203)
 - exercise oversight (30 C.F.R. 585.102(a)(12))
 - approve departures (See **30 C.F.R. 585.103**)
 - E.g., lessees / operators must generally:
 - conduct activities in a manner that ensures safety and avoids undue harm (30 C.F.R. 585.105(a))
 - comply with regulations (Id. at (d))
 - timely remit payments (Id. at (e))
 - timely respond to BOEM requests (Id. at (c), (j))
 - requirements / limitations on who may hold a lease (30 C.F.R. 585.106, .107)
 - E.g., appeal framework (30 C.F.R. 585.118, Part 590)



Regulatory Framework –Offshore Wind Leasing

Analysis	Leasing	Site Assessment	Construction and Operation
 BOEM publishes Call for Information and Nominations BOEM identifies priority Wind Energy Areas (WEAs) offshore. WEAs are locations that appear most suitable for wind energy development, or BOEM processes unsolicit- ed lease application as applicable BOEM may prepare an Environmental Assessment for Lease Issuance and Site Assessment Activities EM, Wind Energy Leg gram/Leasing/Five-Y 	 BOEM determines whether Competitive Interest exists If Competitive Interest exists, BOEM notifies the public and developers of its intent to lease through Sale Notices before holding a lease sale If Competitive Interest does not Exist, BOEM negotiates a lease (note: issuance may be combined with plan approval) 	 Lessee conducts site characterization studies Lessee submits Site Assessment Plan (SAP) BOEM conducts environ- mental and technical reviews of SAP, eventually deciding to approve, approve with modification, or disapprove the SAP If approved, Lessee assesses site (usually with meteorological tower(s) and/or buoy(s) w.boem.gov/sites/default/ DPP/NP-Wind-Energy-Cor 	 Lessee may conduct additional site characterization Lessee submits Construc- tion and Operations Plan (COP) BOEM conducts environ- mental and technical reviews of COP, eventually deciding to approve, approve with modification, or disapprove the COP If approved, Lessee builds wind facility
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- Call for Information and Nominations (30 C.F.R. 585.211(a))
 - Solicitation of comments re (e.g.) "which areas should receive special consideration and analysis," "geological conditions," and suggestions for lease areas
 - 45-day comment period
- Identification of Wind Energy Areas ("WEAs") that appear most suitable for wind energy development and preliminary environmental analyses (30 C.F.R. 585.211(b))



Phase 2: Leasing – Procedure

- Request for Interest (30 C.F.R. 585.210)
 - May be issued on a national, regional, or site-specific basis
 - Determine competitive interest
 - If there *is not* competitive interest, but one party wants to acquire a lease, BOEM may proceed with the <u>non-competitive</u> leasing process (30 C.F.R. 585.212, 585.231(d)-(i))
 - If there *is* competitive interest, then BOEM proceeds with the competitive leasing process (30 C.F.R. 585.211)



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Phase 2: Leasing – Procedure, Cont'd

- Non-Competitive Leasing Process
 - Determination of No Competitive Interest (30 C.F.R. 585.231(d))
 - Lease proposal, which must (*e.g.*) (**30 C.F.R. 585.230**):
 - Identify area requested for lease
 - Describe objectives
 - Present schedule of proposed activities
 - Data and information
 - Demonstrate qualification
 - Acquisition fee
 - BOEM coordination with Federal, State, local agencies (30 C.F.R. 585.231(e))
 - BOEM offer and issuance of a noncompetitive lease (30 C.F.R. 585.231(f))
 - Federal Register notice (30 C.F.R. 585.231(h))



Phase 2: Leasing – Procedure, Cont'd

- Competitive Leasing Process Sales (30 C.F.R. 585.211-225)
 - Proposed Notice of Sale (30 C.F.R. 585.211(c); 585.216)
 - Requests comments regarding
 - Leasing area
 - Lease sale provisions (e.g., size, term, stipulations, etc.)
 - Auction details
 - Lease form
 - Criteria for evaluating bids
 - Award procedures
 - E*t*c.
 - 60-day comment period
 - Final Notice of Sale (30 C.F.R. 585.211(d))
 - Published at least 30 days prior to scheduled sale

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Phase 2: Leasing – Procedure, Cont'd

- Competitive Leasing Process Sales, Cont'd
 - Competitive Auctions (30 C.F.R. 585.220, 585.222)
 - Sealed bidding; Ascending bidding; Two-stage bidding; Multiplefactor bidding

Bid System	Bid Variable	
Cash bonus with a constant fee rate (decimal)	Cash bonus	
Constant operating fee rate with a fixed cash bonus	Fee rate (per 585.506) to set operating fee per year during operations term	
Sliding operating fee rate with fixed cash bonus	Fee rate (per 585.506) to set operating fee for first year of operations term; rate for subsequent years changes by mathematical function specified in FNOS	
Cash bonus and constant operating fee rate	Cash bonus and constant operating fee rate (see above)	
Cash bonus and sliding operating fee rate	Cash bonus and sliding operating fee rate (see above)	
Multi-factor combination	Variables identified in FNOS and include both monetary and non-monetary factors	

• Bidding System For Commercial Leases (30 C.F.R. 585.221)



Phase 2: Leasing – Procedure, Cont'd

- Competitive Leasing Process Sales, Cont'd
 - If BOEM accepts a bid, it will send the bidder a notice with three copies of the lease form (**30 C.F.R. 585.224**).
 - To accept the lease, the bidder must:
 - Within 10 days, execute the lease, provide requisite financial assurances, and pay the balance of the bonus bid
 - Within 45 days, pay first 12 months' rent
 - A lease becomes effective the "first day of the month following the date a lease is signed by a lessor" (**30 C.F.R. 585.237**)
 - If BOEM rejects a bid, it will provide a written statement to that effect along with a refund of any money deposited (**30 C.F.R. 585.225**).



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Phase 2: Leasing – Rights Conferred

"A lease issued under this part grants the lessee the right, subject to obtaining necessary approvals ..., to occupy, and install and operate facilities on, a designated portion of the OCS for the purpose of conducting: (1) commercial activities; or (2) other limited activities that support, result from, or relate to the production of energy from a renewable energy source." **30 C.F.R. 585.200(a)**.

- Note re *Fisheries Survival Fund v. Jewell*, No. 16-cv-2409, 2018 U.S. Dist. LEXIS 168532 (D.D.C. Sept. 30, 2018), aff'd sub nom., Fisheries Survival Fund v. Garden State Seafood Ass'n, 858 Fed. Appx. 371 (D.C. Cir. 2021).
- · Note re Commerical Leases vs. Limited Leases



Phase 2: Leasing – Rights Conferred, Cont'd

Approvals for Operations on a Commercial Lease (30 C.F.R. 585.600)		
Type of Operation	Approval Required	
Site Assessment Activities	Site Assessment Plan	
Activities Pertaining to Construction of Facilities or Commercial Operations	Construction and Operations Plan	

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Phase 3: Site Assessment

- Site Assessment Plans ("SAP")
 - <u>Timing for Submission</u>. SAP may be submitted either before the lease is granted or within 12 months of lease issuance (**30 C.F.R. 585.601**)
 - <u>Contents of Submission</u>. Extensive filing, including (but not limited to):
 - Describe activites planned for characterization of commercial lease (30 C.F.R. 585.605)
 - Physical characterization survey & baseline environmental survey (id.)
 - Proposed activities are safe, conform to all applicable laws, does not unreasonably interfere with other OCS activities, use best available and safest technology, use best management practices, and use properly trained personnel (**30 C.F.R. 585.606(a)**)
 - Proposed activities will satisfy conditions of any lease stipulation (30 C.F.R. 585.610)
 - Location plat (*id.*)
 - Information re each type of facility associated with plan (id.)
 - Discussion of methodologies for decommissioning (*id.*)
 - List of interested agencies (Federal, State, local) (id.)
 - "[D]etailed information to assist BOEM in complying with NEPA" (30 C.F.R. 585.611)



Phase 3: Site Assessment

- SAPs, Con't
 - Processing and Review.
 - CZMA review (30 C.F.R. 585.612)
 - NEPA review (30 C.F.R. 585.613(b))
 - Coordination with relevant Federal, State, local authorities (30 C.F.R. 585.613(c))
 - Action on Proposed SAP. (30 C.F.R. 585.613(e))
 - · BOEM may approve, disapprove, or approve with modifications
 - If BOEM approves an SAP, it will "specify the terms and conditions to be incorporated into [the] SAP"
 - A lessee may begin proposed acitvities upon approval of the SAP (**30 C.F.R. 585.614(a)**)
 - If BOEM disapproves an SAP, it will inform the lessee and provide an opportunity to submit a revised SAP



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Phase 3: Site Assessment

- Activities Following SAP Approval
 - Reports and Notices Post-Approval. (30 C.F.R. 585.615)
 - Notify BOEM within 30 days of completing installation activities
 - · Submit report annually summarizing site assessment activities and results
 - Submit certification of compliance annually
 - Revisions to Approved SAP Requiring Add'I Approval. (30 C.F.R. 585.617)
 - Activities not described in approved SAP
 - Changes to surface location
 - Modification to size or type of facility
 - <u>Completion of Site Assessment Activities</u>. (30 C.F.R. 585.618)
 - Submission of COP during Site Assessment period
 - Potential decommissioning of site assessment facilities
 - Lessee has 5 years following SAP approval to conduct site assessment and prepare and submit COP (30 C.F.R. § 585.235)



Phase 4: Construction and Operations

- Construction and Operations Plans ("COP")
 - Timing of Submission. Prior to end of Site Assessment phase (30 C.F.R. § 585.235)
 - Contents of Submission.
 - Describe all planned facilities and proposed activities (30 C.F.R. 585.620)
 - Demonstrate that the activities are safe, conform to all applicable laws, do not unreasonably interfere with other OCS activities (**30 C.F.R. 585.621, 585.626**)
 - Use of best available and safest technology, best management practices, properly trained personnel (30 C.F.R. 585.621(e)-(g))
 - Survey results (30 C.F.R. 585.626)
 - Identify cables and pipelines (id.)
 - Decommissioning procedures (*id.*)
 - Financial assurance (id.)
 - "[D]etailed information to assist BOEM in complying with NEPA" (30 C.F.R. 585.627)
 - Etc.

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Phase 4: Construction and Operations

- COPs, Cont'd
 - Processing and Review.
 - NEPA review (30 C.F.R. 585.628(b))
 - CZMA review (30 C.F.R. 585.628(c))
 - Coordination with relevant Federal, State, local authorities (30 C.F.R. 585.628(d))
 - Action on Proposed COP.
 - BOEM may approve, disapprove, or approve with modifications (30 C.F.R. 585.628(f))
 - If BOEM approves a COP, it will "specify the terms and conditions to be incorporated into [the] COP" (30 C.F.R. 585.628(f)(1))
 - A lessee must begin proposed acitvities under approved COP per approved schedule (30 C.F.R. 585.631)
 - If BOEM disapproves a COP, it will inform the lessee and provide an opportunity to submit a revised COP (30 C.F.R. 585.628(f)(2))



Phase 4: Construction and Operations

- Activities Following COP Approval
 - Reports and Notices Post-Approval.
 - Facility Design Report & Fabrication and Installation Report (30 C.F.R. 585.632)
 - SEMS (id.)
 - Annual certification of compliance (30 C.F.R. 585.633)
 - <u>Revisions to Approved COP Require Approval</u>. (**30 C.F.R. 585.634**)
 - Activities not described in the approved COP
 - · Modificaitons to size / type of facility or equipment
 - Change in surface location
 - Structural failure
 - <u>Duration</u>. If BOEM approves the COP, then the lessee of a commercial lease "will have an operations term of 25 years [beginning on the day after BOEM approves the COP], unless a longer term is negotiated[.]" (**30 C.F.R. 585.235(a)(3)**)



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Decommissioning

- Accrual of Decommissioning Liability.
 - "when you are or become a lessee or grant holder, and you either install, construct, or acquire by a BOEM-approved assignment a facility, cable, or pipeline, or you create an obstruction to other uses of the OCS." (30 C.F.R. 585.901)
- Nature of Decommissioning Liability.
 - Joint and several (30 C.F.R. 585.900)

• Approvals and Reports.

- Decommissioning Application (**30 C.F.R. 585.902**)
- Notice 60 days before beginning decommissioning (id. & 585.908)
- Summary within 60 days of removal of facility, cable, or pipeline (30 C.F.R. 585.912)
- <u>Timing</u>.
 - Within two years of lease termination (30 C.F.R. 585.902)





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Renewable Project Development



In-House Perspective Panel Louisiana Mineral Law Institute

March 31, 2022



Panel Participants



Thomas Turner



Russell Buerhle



Peter Vermillion

Sara Glover

Arnold&Porter

Introduction



What role does in-house counsel play?

Legal Role vs. Business Role

Cost Center vs. Value Creation

Decision Maker vs. Advisory

Operational Issues

The Need for Speed



Regulatory

Lease/Surface Issues

TRO

Accidents

Arnold&Porter

Title Opinions



Know your Audience

Know how your Client Works

English is your Friend

Brevity

Arnold&Porter

Litigation



Professionalism

Discovery

Business Objective

Settlement

Arnold&Porter

Transactions



One Size Doesn't Fit All

Negotiations

Experience

Business Objective

Pet Peeves



Communication

Model Rule 1.4 provides in part that a lawyer shall:

- 1. promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- 2. reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- 3. keep the client reasonably informed about the status of the matter; and
- 4. promptly comply with reasonable requests for information.
- Memos v. Emails
- Unnecessary Background
- Reinventing the Wheel
- Timeliness

File Management

Model Rule 1.3 provides:

A lawyer shall act with reasonable diligence and promptness in representing a client.

- Responsiveness and Updates on Status
- Adding more lawyers
- Being Organized
- 12th hour requests

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Billing

Model Rule 1.5 provides:

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

- Billing Guidelines
- Timely Billing
- Correct Billing
- Billing for unrequested work

Marketing and Training

Model Rule 1.1 provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

- Timely Updates on Material Developments
- Diverse Teams
- In-house non-lawyer training

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Confidentiality

Model Rule 1.6 provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.

- SEC Regulations
- Common Sense

Conflicts

Model Rule 1.9:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

• Where in-house lawyers don't want to see their outside law firms.



Questions?

UNITIZATION IN LOUISIANA

Office of Conservation: History, Procedures, and Recent Developments

SCOTT R. PATTON

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- V. CROSS-UNIT WELLS

Regulatory Comparison

INTRODUCTION

Louisiana's regulatory regime regarding the pooling and unitization of oil and gas development has evolved with the industry to provide a productive environment for operators and landowners to benefit from the natural resources of the state. Whether through brilliant foresight or luck (and maybe a little bit of both), the State has forged a regulatory framework for operators and landowners to participate in a system that provides for predictability, public participation, and finality.

A unitization order from the Commissioner of Conservation imposes significant and long-lasting effects upon both the geographic and geologic features of land. From a contractual, operational, and economic perspective, a Commissioner's order has wide-ranging effects for operators, landowners, mineral owners, and other lessees within a unit. Therefore, both the regulatory inquiry and public scrutiny on a unit application is warranted to provide an operator with the security and finality of an order once it decides to drill a well and commence production.

I. <u>A BRIEF HISTORY OF OIL AND GAS REGULATION IN LOUISIANA</u>

The first decade of the twentieth century saw the birth of oil and gas conservation statutes in the United States, including the State of Louisiana. Act No. 71 of 1906 is considered to be Louisiana's first conservation statute, which was enacted following a blowout and conflagration of two natural gas wells in north Louisiana.¹

The 1906 legislation prohibited the intentional or negligent allowing of a natural gas well to flow wild. It also barred anyone from setting fire to a natural gas well, and established procedures for plugging and abandonment of gas wells. The State enacted additional legislation directed specifically at the physical waste of natural gas over the next several years, including legislation that set established standards for plugging and abandonment, and set maximum time periods for operators to gain control of wells.²

In 1908, President Theodore Roosevelt hosted a Conference of Governors that addressed conservation of a broad range of natural resources. The governors adopted a declaration of principles that recommended "the enactment of laws looking to the prevention of waste in the mining and extraction of coal, oil, gas, and other minerals, ... and to the protection of human life." ³ The Louisiana legislature referenced that Governor's Conference in Act No. 144 of 1908, which created a Commission for the Conservation of Natural Resources. This seven-member Commission was given the task of studying Louisiana's natural resources and recommending ways to prevent waste in the production of oil and gas.

By Act No. 265 of 1910, the legislature created the Conservation Commission to replace the Commission for the Conservation of Natural Resources. The new Conservation Commission

¹ Keith B. Hall, *Louisiana's Mineral Resources*, LOUISIANA MINERAL LAW TREATISE, Chapter 1, § 106 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012)

 $^{^{2}}$ Id.

 $^{^{3}}$ Id.

included separate departments to oversee wildlife, forests, and minerals, with the department that regulated minerals being called the Department of Mining and Minerals. That department's powers included the authority to regulate oil and gas activity.⁴

Act 127 of 1912 created the Conservation Commission as a department of the state government and provided that the commission should be composed of three commissioners further defining their duties and powers. Act 127 also expanded the authority of the Conservation Commissioner to protect the natural resources of the State, including the requirement that drilling permit applications include maps showing the well location, the use of surface casing, and the plugging of dry holes.⁵ In 1914, the separate departments for minerals, forests, and wildlife were dissolved, with their functions all being folded into one organization under the Conservation Commission. Act No. 66 of 1916 amended and re-enacted Act No. 127 of 1912 to reduce the number of commissioners from three to one.

Act No. 66 of 1916 is often cited as the statutory creation of the Louisiana Department of Conservation, with a single officer called the Commission of Conservation in charge.⁶ Shortly thereafter, the Louisiana Constitution of 1921 is also often cited as creating the Department of Conservation to "protect, conserve, and replenish the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof."⁷ By the Constitution of 1921, the status of the Commissioner of Conservation was changed from that of a statutory officer to that of a constitutional officer, and placed authority with the Governor's office to appoint a Commissioner of Conservation for a term of four years.⁸

Therefore, somewhat redundantly, the "Department of Conservation" can claim two separate statutory origins: (1) Act No. 66 of 1916, which marked the creation of the Department of Conservation by the legislature, and (2) the Louisiana Constitution of 1921, which memorialized the Department of Conservation in the State Constitution.

The purpose and necessity of the two statutory establishments was discussed in the fascinating case of *State ex rel. Saint v. Irion*, which demonstrated that, in true Louisiana fashion, the terms of the first Commissioners were not without political controversy.⁹ In brief, the case involved a Commissioner appointed by a prior governor who refused to give up his office to the new Commissioner appointed by the newly elected governor. The court discussed whether provisions of the Constitution of 1921 superseded the Act No. 66 of 1916 and therefore modified the beginning and ending of the Commissioner's term.

The Supreme Court explained the seeming redundancy of Act No. 66 of 1916 and Article VI of the Constitution of 1921 as follows:

 $^{^{4}}$ Id.

⁵ Frank Harrison, *The History of the Oil and Gas Industry in Louisiana*, 50 Annual Institute on Mineral Law (2003).

⁶ Keith B. Hall, Louisiana's Mineral Resources, LOUISIANA MINERAL LAW TREATISE, Chapter 1, § 106

⁽Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012)

⁷ Section 1 of Article VI of the Constitution of 1921.

⁸ State ex rel. Saint v. Irion, 125 So. 567, 568 (La. 1929).

⁹ Id.

The only effect of transforming the statutory office of commissioner of conservation into the constitutional office of commissioner of conservation was to increase the salary of the commissioner and to prevent, when confirmed by the Senate, his removal by the Governor. No attempt was made by the framers of the Constitution to define his powers nor to prescribe his duties....[The framers of the Constitution] were merely reaffirming in constitutional form that which was already existing and functioning in statutory form, ...There is nothing in the legislative act with respect of the establishment of the department of conservation, the office of commissioner of conservation, the term of the office, and the Governor's power of appointment with the concurrence of the Senate that is inconsistent with the organic law. On the contrary, the utmost harmony is maintained between the statutory provisions and the constitutional provisions.¹⁰

The Supreme Court's decision in the *Irion* case, along with the lengthy and fervent dissenting opinions, provide an interesting window into the machinations of Louisiana's burgeoning administrative state. The Supreme Court ultimately held against the prior Commissioner and declared him "an intruder into and unlawfully holding and exercising the functions of [the Commissioner of Conservation]" and ordered the prior commissioner to forthwith deliver to [the new commissioner] the possession and physical properties of said office."¹¹

Though the statutory and constitutional developments in 1916 and 1921 officially established the Department of Conservation, many commentators view Act No. 157 of 1940, which created the Louisiana Conservation Act, as the catalyst for the "modern era" of oil and gas regulation in Louisiana. Act No. 157 established the regimentation of drilling and production procedures administered by the Commissioner of Conservation, which played an important role in acceleration of oil and gas development in Louisiana.¹² Importantly, the 1940 Act enacted a comprehensive Conservation statute, giving the Commissioner the authority to prohibit the waste of oil and gas, avoid the drilling of unnecessary wells by integrating property into drilling units, thereby allowing the owners of separate tracts of land embraced within these units "to pool their interests and to develop their lands as a drilling unit," and authorizing the Commissioner, in the event they refuse so to do, to require them to.¹³

Several decades after enactment of the Louisiana Conservation Act, Louisiana undertook a reorganization of State government in 1976, which resulted in the creation of the Department of Natural Resources ("DNR"), and which placed the Department of Conservation under the umbrella of the Department of Natural Resources and renamed it the Office of Conservation. The Commissioner of Conservation retained his status as Commissioner and was also allotted the title

¹⁰ *Id.* at 569.

¹¹ *Id.* at 572.

¹² See Philip N. Asprodites, *Conservation Practice*, LOUISIANA MINERAL LAW TREATISE, Chapter 15, § 1501 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012); *See also* Frank Harrison, *The History of the Oil and Gas Industry in Louisiana*, 50 Annual Institute on Mineral Law (2003).

¹³ Arkansas Louisiana Gas Co. v. Sw. Nat. Prod. Co., 60 So. 2d 9, 10–11 (La. 1952).

of Assistant Secretary of the Department of Natural Resources. Despite the inclusion of the Office of Conservation within DNR, the Commissioner has retained his independent adjudicatory and regulatory powers.¹⁴

Today, the term "Commissioner" may be a bit of misnomer in that the Commissioner of Conservation does not preside over an elected or appointed "commission" of regulators, but instead serves as the titular head of the Conservation Division within the Department of Natural Resources. However, the title is appropriate in that the Commissioner represents the supreme authority in the regulation of oil and gas in the State.

II. JURISPRUDENCE ON THE AUTHORITY OF THE COMMISSIONER OF CONSERVATION

Before discussing the procedures by which the Commissioner exercises his broad authority, it is helpful to provide some background on the legal framework which grants the power and authority to the Commissioner of Conservation and the orders that are issued from his office. For the purposes of this paper, the focus will be on the tension between the police power granted to the Commissioner of Conservation to create compulsory units and permit unit wells and the private property rights granted to the citizens of Louisiana.

The Louisiana Constitution provides that the right to use private property is only subject to "reasonable statutory restrictions and the reasonable exercise of police power."¹⁵ However, Louisiana courts have recognized the broad police powers granted to the Commissioner for the regulation and conservation of oil, gas, and other mineral deposits and, therefore, the Commissioner's power to, in some instances, supersede private property rights. The statutes created under Act No. 157 of 1940 and enacted as La. Rev. Stat. Ann. § 30:1, et seq grant authority to the Commissioner to establish units and permit wells and even contemplates that unit wells may be located on unleased tracts or tracts leased to third-party lessees located within the compulsory unit.

As early as 1957, the Louisiana Supreme Court in *Delatte v. Woods*¹⁶ articulated the power of the Commissioner's authority to supersede private property rights:

On numerous occasions we have reviewed and analyzed the conservation laws of this State in respect to their effect on individual and property rights. Necessarily the exercise of the police powers of a state justifies the regulation and conservation of oil, gas and other valuable mineral deposits within its territorial limits. Public interest demands not only a maximum recovery of

¹⁴ Philip N. Asprodites, *Conservation Practice*, LOUISIANA MINERAL LAW TREATISE, Chapter 15, § 1501 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012).

¹⁵ La. Const. Art. 1 § 4.

¹⁶ 94 So. 2d 281 (La. 1957).

these minerals but equally as well sound public policy in the conservation and production thereof.¹⁷

The Supreme Court in *Delatte* also provided the following holdings, oft cited in cases and briefs regarding the wide-reaching power of the Commissioner:

In interpreting and applying these laws we are called upon to give due regard not only to public interest but to contractual relations and individual and property rights as well. However, it is firmly established that individual and property rights and contractual relations must yield to a proper exercise of the police power; and it is in the light of this principle that such laws are recognized as constitutionally valid. *Everett v. Phillips Petroleum Co.*, 218 La. 835, 51 So.2d 87 and cases cited therein; *Smith v. Holt*, 223 La. 821, 67 So.2d 93.

•••

It is firmly established in our jurisprudence that statutory authority is granted to the Commissioner of Conservation to create drilling developmental units and to integrate various tracts of various owners contained in such units, that the orders of the Commissioner supersede, supplement, replace and are incorporated in the provisions and obligations of contracts and leases relating to mineral development. LSA-R.S. 30:1 et seq. It necessarily follows that these orders become the law as between the parties in determining their respective rights and obligations.

•••

The rule is too well established in our jurisprudence to require citation that the drilling and production of oil from a unitized area constitutes an exercise and user of the mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease covering any property or tract located within the unit.¹⁸

Louisiana statutory law clearly dictates that whenever owners do not agree by separate contract to pool, drill, and produce their interests, the Commissioner of Conservation has the power to "require them to do so and to develop their lands as a drilling unit, if he finds it to be necessary to prevent waste or to avoid drilling unnecessary wells."¹⁹ Under the law of conservation, operations on and production from a unit well are deemed operation upon and production from every lease that is part of that unit, and the Commissioner of Conservation has the plenary authority to declare drilling and production units, to force pool neighboring tracts and

¹⁷ *Delatte* at 286–87.

¹⁸ Id.

¹⁹ La. Rev. Stat. Ann. § 30:10(A)(1).

leases into a single unit, to designate a single well and operator for the unit, and to allocate production from the unit well to each participating tract and lease-all for the purpose of conserving resources, avoiding waste, and eliminating unnecessary wells.²⁰

In the seminal case of *Nunez v. Wainoco Oil & Gas Co.*²¹, the Louisiana Supreme Court thoroughly set forth the scope of the power of the Commissioner's orders when directly considering whether the formation of a Commissioner's unit affects the principles concerning ownership of property and/or alters the concept of trespass within the bounds of the unit, and in particular, beneath an owner's tract. In *Nunez*, the Supreme Court addressed a situation where a unit operator drilled a unit well at a surface location on a tract on which the unit operator enjoyed full mineral leasehold rights. However, the well inadvertently deviated and drifted under an adjoining tract owned by Nunez on which the unit operator. Nunez sued for an injunction seeking to cause the unit operator to remove the wellbore from underneath his property. The Louisiana Supreme Court held that, in the context of the facts submitted, the authority of the Commissioner of Conservation superseded the private property rights of landowners within the unit and, as a result, the unit operator, by virtue of the unit order, was authorized to drill the well through or under Nunez's tract. The injunctive relief was denied, and the trespass action dismissed.

The court in *Nunez* set forth several building blocks on which it based its reasoning. First, the Supreme Court acknowledged that the authority of the Commissioner to form units and determine the optimum location for the unit well supersedes private property rights. The Court held that:

Unitization is the device which the Louisiana Department of Conservation employs to protect the correlative rights of surface owners in a common reservoir, and, as discussed earlier, the device is clearly available without the consent of a particular landowner.

...[W]e conclude that the established principles of private ownership, already found inadequate in Louisiana to deal with the problems of subsurface fugacious minerals (*see* Daggett, *supra* at 415), need not necessarily be applied to other property concepts, like trespass, within a unit created by the Department of Conservation.

Next, the court discussed how an order changes the contractual relationships among the parties within a unit, holding that:

. . .

²⁰ La. Rev. Stat. Ann. § 30:4, 9, 10.

²¹ 488 So. 2d 955, 959 (La. 1986).

Unitization, which creates rights and interests in a pool of hydrocarbons beyond the traditional property lines, effectively amends La.Civ.Code art. 490 and other private property laws in the interest of conserving the natural resources of the state and, in effect, of protecting private property interests, or 'correlative rights,' of nondrilling landowners. By prohibiting an individual landowner in the unit from drilling wells on their own tracts, by forcing them to share production, and by limiting the amount of hydrocarbons that can be produced, the exercise of the Commissioner's power to unitize necessarily results in infringement on the usual rights of ownership.

Unitization has also resulted in changes in the legal relationships between landowners and lessees within the unit. For instance, the inclusion of a leased tract within a unit relieved the lessee of the tract of his obligation to drill a well on the leased premises.

Finally, the court tied it all together to hold that the operations under the authority of a Commissioner's order did not constitute a trespass under the law:

Therefore, we hold that the more recent legislative enactments of Title 30 and Title 31 supersede in part La. Civ. Code Ann. art. 490's general concept of ownership of the subsurface by the surface owner of land. Thus, when the Commissioner of Conservation has declared that landowners share a common interest in a reservoir of natural resources beneath their adjacent tracts, such common interest does not permit one participant to rely on a concept of individual ownership to thwart the common right to the resource as well as the important state interest in developing its resources fully and efficiently.

In this case, we do not have a well located on the surface of a tract without the owner's consent. Instead, we have the intrusion of a well bore two miles beneath the surface of plaintiff's land, land which had already been included in a drilling unit. The well itself was drilled on a leased tract, in part at the urging of the plaintiff and with his financial participation. It was a well permitted and subject to Statewide Order No. 29-B, which allows a drilling deviation from the vertical of up to five degrees. Although the well was not formally designated as the unit well until 33 days after the well bore likely traversed the invisible boundary into plaintiff's property, the well was clearly intended to be the unit well and could not be produced until it was declared the well for Sand Unit F, or, if the well bottomed in other than Reservoir A, until another unit was created. Therefore, we conclude that the intrusion into the subsurface two miles beneath the tract owned by Adam Nunez was an authorized unit operation. Since established private property law concepts, such as trespass, have been superseded in part by Louisiana's Conservation Law when a unit has been created by order of the Commissioner, we do not find that a legally actionable trespass has occurred in this instance.²² (emphasis added)

The *Nunez* decision is frequently cited as the landmark case establishing the broad power of the Commissioner in matters of unitization and the drilling and location of wells.

Further, in *Teekell v. Chesapeake Operating, Inc*²³., the United States District Court for the Western District of Louisiana recognized that the "*Nunez* opinion make[s] it clear that unitization takes place pursuant to a permit of the Commissioner of Conservation and not the consent of the landowner. A landowner cannot prevent the establishment of a unit, and, in fact, a unit can be established directly against the wishes of a landowner. A landowner in a unit does not have the right to choose the operator of the unit or the location of the drilling site. Moreover, a landowner is not allowed to keep all of the production from drilling on his property. Rather, he must share the production with the others in his unit."²⁴ The Court went on to acknowledge that "a unit operator is not controlled or selected by the landowner or his lessees or assignees. The unit, the unit operator, and the drill site are all chosen by the Commissioner of Conservation and can be chosen without the consent of the landowner or his lessees and assigns."²⁵

One year after *Teekell*, , in *Peironnet v. Matador Resources Co.*²⁶ the Louisiana Supreme Court reiterated the power of a Commissioner's Unit order in the context of a continuous development obligation in the Haynesville Shale, expanding upon the principles set forth in *Nunez* and *Delatte*. In *Peironnet*, the Supreme Court was called to consider whether operations conducted off of the leased premises but on lands unitized therewith were sufficient to maintain a mineral lease under the lease's continuous operations clause. The court cited *Delatte* and *Nunez* for the proposition that the orders of the Commissioner superseded and replaced the provisions of mineral leases and that drilling and production of oil from a unitized area constitutes exercise of mineral rights throughout the entire unit and operates as a substitute for performance of drilling operations under a mineral lease. The court then concluded that the wells drilled by defendants on the compulsory units were the "legal and functional equivalent of wells drilled by the Lessees…on plaintiff's lease."²⁷ The court cited the specific provision contained in Commissioner's unit orders which led it to such a conclusion:

Also, all operations on and production from a unit shall be considered operations on and production from each of the separate

²² *Id.* at 963-64.

²³ 2012 WL 204 9922 (W.D. LA. 6/6/2012).

 $^{^{24}}$ Id.

²⁵ Id.

²⁶ 144 So.3d 791 (La. 2013).

²⁷ *Id.* at 823.

tracts within such unit and under the terms of each of the mineral leases affecting said tracts.²⁸

Thus, the Supreme Court held that the "production activities from the unitized wells drilled pursuant to a compulsory order of the Office of Conservation within ninety days of the completion of the preceding well satisfied the 'continuous drilling operations' clause of the Lease and served to maintain the Lease in its entirety beyond the primary term."²⁹

Only two months after the Supreme Court rendered the *Peironnet* decision, the Louisiana Second Circuit Court of Appeal, in *Questar Exploration and Production Co. v. Woodard Villa, Inc.*,³⁰ considered the issue of whether a horizontal well which was spud outside of the unit embracing leased premises was sufficient to maintain the deep rights in a mineral lease which included a horizontal Pugh clause. The issue before the Second Circuit was whether a well drilled off of the lease premises and not on unitized lands, but reaching horizontally into a formation under the lease, maintains the lease as to all, or at least part, of the lease. The court reasoned that, though the well was not spud on the leased premises or lands pooled therewith, it nevertheless satisfied the conditions of the horizontal Pugh Clause because the horizontal leg of the well entered into the section comprising the lease prior to the triggering of the stratigraphic release under the horizontal Pugh Clause. In so holding, the court cited *Peironnet v. Matador Resources, supra*, for the proposition that "[1]essors generally benefit from the development of a unit in which their property is located, even if the drilling occurred offsite."³¹

The court went on to state as follows:

The rationale [of *Peironnet*] appears equally applicable in the instant situation; with the advent of horizontal drilling, operators may access leased property or units remotely. Conceivably, this could be a courtesy to the lessor, who does not want wells and noisy drilling operations on his property. When the lessee complies with the provisions of the horizontal Pugh clause, as occurred here, those operations should be held to satisfy the maintenance requirement.³²

Although the *Questar* court did not directly cited the *Nunez* decision, the court's reasoning seems to reflect the following rationale of the *Nunez* court in consideration of questions regarding horizontal and cross-unit wells:

²⁸ *Id.* at 823.

²⁹ *Id.* at 824.

³⁰ 48,104 (La. App. 2d Cir. 8/7/13), 123 So.3d 734.

³¹ *Id.* at 740.

 $^{^{32}}$ Id.
The jurisprudence indicates that it is the intent of the operator and the operations conducted which determine whether drilling operations constitute unit operations or merely lease operations.³³

Although the above language is dicta, the broad principle articulated by the *Nunez* court is that the intent of the operator controls whether a well should be given effect as a unit well or a lease well.

The *Questar* court took note of the rule of the *Delatte* decision, cited with approval by the Supreme Court in *Nunez*, that "the drilling and production of oil from a unitized area constitutes an exercise and use of the mineral rights throughout the entire unit and operates as a substitute for performance of drilling obligations contained in a mineral lease covering any property or tract located within the unit."

Under these principles, the *Questar* court found that unit wells, drilled in some instances by third party operators, were the legal and functional equivalent of wells drilled by the Lessees—whether as operator or not—on plaintiffs' lease as explicitly contemplated in the orders of unitization.

The threshold set forth in the *Nunez* case was whether the operator's actions could be considered a "unit operation." If so, then the operator has a generous amount of leeway to conduct its operations, whether the operations affect leased or unleased landowners.

Most recently, in 2021 the Second Circuit Court of Appeal in *Diamond McCattle Co., L.L.C. v. Range Louisiana Operating, LLC*,³⁴ addressed the issue of what is considered a "unit operation" in the context of cross-unit wells.

In *Diamond McCattle*, the landowners sued Range Louisiana Operating, LLC ("Range"), asserting that Range committed a subsurface trespass by drilling a horizontal well that intruded into the subsurface of their land in Jackson Parish. Range had obtained a permit from the Office of Conservation to drill a lease well to the L-Gray Sand, a formation that was not unitized. Range commenced drilling from a surface location on which it had a lease. Range drilled its well to a total vertical depth within the Lower Cotton Valley Formation, Reservoir A (LCV RA), which was shallower than the permitted formation, the L-Gray Sand. After reaching that shallower depth, Range drilled a horizontal lateral of nearly 5,000 feet. The last 1,443 feet of the resulting horizontal lateral laid beneath the plaintiffs' land. The Office of Conservation had previously issued orders created drilling units for the LCV RA. The portion of the horizontal lateral located beneath the plaintiffs' land was located within one of the pre-existing LCV RA units. The remainder of the horizontal lateral was within a separate LCV RA unit.

Range completed the well on January 10, 2018, and the plaintiffs filed suit two days later, claiming that the drilling of a lease well whose lateral extended under its unleased tract of land constituted a trespass. The facts of the case do not indicate how the plaintiffs were notified of the

³³ *Nunez* at 964, Footnote 28.

³⁴ 53,896 (La. App. 2 Cir. 4/14/21), writ denied, 2021-00681 (La. 9/27/21).

Regulatory Comparison

well location beneath their land. On February 28, 2018, Range applied to the Office of Conservation to amend its permit to designate its well as a unit well. The Office of Conservation later issued an order designating the well as a unit well for each of the two units that included portions of the well's horizontal lateral, which unit order was effective March 27, 2018.

In the trial court, Range submitted an expert witness affidavit stating that it is an accepted practice for the Office of Conservation to issue a permit that authorizes an operator to drill to a deep, non-unitized formation, even though the operator's main objective is to test a shallower, unitized formation. Another witness testified that it is common practice to designate a well as a lease well so that an operator can obtain a permit and begin drilling without waiting for the hearing that is needed to have a well designated as a cross-unit well. Range also submitted evidence that its intent all along was to drill a unit well to the LCV RA Formation, rather than a lease well to the L-Gray Sand.

The defendants also presented an affidavit from an employee of the Office of Conservation stating that the office allows permitting activity like that which occurred in this case (permitting a lease well which is later amended to a unit well) because it allows unit wells to be permitted to accommodate an operator's need to drill the well before a public hearing can be held recognizing the well as a substitute unit well, an alternate unit well, or a cross-unit horizontal well. Additionally, the employee stated that the well is deemed a unit well from the date of first production, notwithstanding the initial lease well designation.

The district court granted summary judgment in favor of Range, relying on *Nunez*, for the principle that a unit the operator is not liable for subsurface trespass when a unit well intrudes into the subsurface of unleased land that is located within the unit.

The plaintiffs appealed to the Louisiana Second Circuit and argued that Range did not have a lease to operate on their land and at the time Range drilled and completed its well, the well had not been designated as a unit well for the LCV RA Formation. Instead, the plaintiff argued that the well was permitted as a lease well for the deeper L-Gray Sand, and that Range had not yet applied to amend its permit at the time it drilled and completed the well.

The Second Circuit rejected the plaintiffs' arguments. The court cited *Nunez* for the proposition that the intent of the operator controls whether an operation is a unit operation or a lease operation, and that an operation can constitute a unit operation even if the drilling permit identifies the well as a lease well. The court also noted that the undisputed evidence showed that Range's intent all along was to drill to the LCV RA unit. Therefore, the drilling constituted a unit operation even though the well had not yet been designated as a unit well.

The jurisprudence cited above recognizes the broad power of the Commissioner of Conservation, which hinges upon crucial language contained in every Commissioner's order that creates a new unit, specifically the following paragraph which contains two substantially impactful provisions on the contractual rights and operational effectiveness of unit operations:

The separately owned tracts, mineral leases, and other property interests within each of the units created herein are hereby pooled, consolidated, and integrated in accordance with Section 10, Title 30, of the Louisiana Revised Statutes of 1950, with each tract sharing in unit production in the proportion that the surface area of such tract bears to the entire surface area of the unit in which it is situated. Also, all operations on and production from a unit shall be considered operations on and production from each of the separate tracts within such unit and under the terms of each of the mineral leases affecting said tracts.

As discussed above, an Order from the Commissioner has significant effects upon contractual and property rights of the parties within the unit. The next sections of this paper will discuss the process and methodology that the Commissioner utilizes to determine if a unit application is in the best interest of conservation, protects the correlative rights of all parties, and contributes to the efficient and economic development of the resources of the State.

III. FORCED POOLING AND UNITIZATION: STATUTORY AND CUSTOMARY GUIDELINES

According to the statute, "drilling unit" is defined as "the maximum area which may be efficiently and economically drained by the well or wells designated to serve the drilling unit as the unit well, substitute unit well, or alternate unit well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities."³⁵ In keeping with the Office of Conservation's mission of preventing waste and avoiding the drilling of unnecessary wells, when establishing a unit the Commissioner must find that each unit allows the owners therein to obtain each tract's just and equitable share of the production of the pool. A pool is defined as "an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both."³⁶ In determining each tract's just and equitable share of the production authorized for the pool, the Commissioner is authorized by statute to make technical determinations as to each unit by taking into consideration the following: "the productivity of the well or wells located thereon, as determined by flow tests, bottom hole pressure tests, or any other practical method of testing wells and producing structures, and to consider other factors and geological and engineering tests and data as may be determined by the commissioner to be pertinent or relevant to ascertaining each producer's just and equitable share of the production and reservoir energy of the field or pool."³⁷

The Commissioner may form a drilling and production unit on a geographic or geologic basis depending on the nature of the boundaries of the reservoir. Geologic units, most common in south Louisiana, are formed when "available well controls are not adequate to define the productive limit of the reservoir or the geology ... is too complex for geologic mapping, making it impossible to ascertain geologic boundaries of units."³⁸ The size of geologic units are dependent on a number of factors, including geology, productive area, lease position, precedent

³⁵ La. Rev. Stat. Ann. § 30:9

³⁶ La. Rev. Stat. Ann. § 30:3 (10)

³⁷ La. Rev. Stat. Ann. § 30:9

³⁸ Madhurendu B. Kumar, "Delineation of Petroleum Reservoir Boundaries of Unitization in Louisiana: An Overview of Practices and Trends", THE PROFESSIONAL GEOLOGIST, p. 2 (May 2002).

in a field, producing horizon or trend, and economics.³⁹ The Office of Conservation employs the concept of "adopted geology" when defining the boundaries and limits of a geologic unit. According to Dr. M.B. Kumar, the former Director of the Geological Oil and Gas Division of the Office of Conservation, adopted geology forms the basis of geological unitization by factoring in the following:

[the] definition of producing horizon (sand or zone/reservoir), subsurface elevations of the horizon penetrated in the well, depths and throws of faults, dip and strike of the horizon and faults, and down-dip productive limit. For unitization purposes, the data previously used in unit determinations are not allowed to be reinterpreted in order to honor the adopted geology. However, in the event new well controls clearly warrant a revision of the adopted geology, the latter is revised with a minimal change to unit boundaries.⁴⁰

However, the unit operator should evaluate any new wells drilled to determine its potential impact on the boundaries of the unit. If a revision to the previously adopted unit geology is warranted, the unit boundaries are modified through the same regulatory process used to create the initial unit boundary.⁴¹

In contrast to geologic units, the boundaries of geographic units are set by utilizing surface markers such as governmental section lines, property lines, lease boundaries, roads, or relevant geological features such as shore lines, river banks, subsurface fault lines, or permeability barriers.⁴² While geographic boundary lines based upon governmental section lines are utilized most frequently, the size of geographic units may vary based upon the selected portions of the unitized section, precedent in the field or for the intended horizon, and the depth of the well.⁴³

While the industry typically associates geologic units with south Louisiana and geographic units with north Louisiana, other commentators have noted that there is no clear line as to where north Louisiana ends and south Louisiana begins, nor is there a different set of statutes regarding unitization in north Louisiana and south Louisiana or any distinction in the statutes based upon the geographical area of the state affected by the application.⁴⁴ From a practical perspective, the contrasts in units created in different parts of the state are largely attributable to the stratigraphy and characteristics of the particular formation being exploited. Put another way, the rock up north is different in many ways from the rock down south.⁴⁵

³⁹ Id.

⁴⁰ Id.

⁴¹ *Id.* at 3.

⁴² *Id.* at 2.

⁴³ *Id.*

⁴⁴ Randall C. Songy and Louis F. Gilbert, *North vs. South: A Comparison of the Application of Louisiana Unitization Laws Across Different Areas of the State*, 53 Ann. Inst. On Min. Law, 1 (2006).

⁴⁵ For a thorough analysis of these geologic differences, please reference the excellent 2006 paper authored by Songy and Gilbert cited immediately above.

Whether the unit is geologic or geographic, the Commissioner must adhere to the same statute in creating a unit that affords to the owner of each tract the opportunity to recover his just and equitable share of hydrocarbons in the pool.⁴⁶ A tract's "just and equitable share" is defined as that part of the authorized production of the pool which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract bears to the recoverable oil and gas in the total developed area of the pool, "in so far as these amounts can be practically ascertained."⁴⁷ With rare exception, each unit order establishes the equities within each unit on a surface acre basis of participation without regard to the relative volumes of hydrocarbons under each tract.⁴⁸ Each owner participates in the production and costs of the units based upon the proportion of the surface acres of his tract bears in relation to the total amount of surface acres within the unit. The pertinent language in each Commissioner's order, previously noted above, is as follows:

That the separately owned tracts, mineral leases, and other property interests within the unit created herein are pooled, consolidated and integrated in accordance with Section 10, Title 30 of Louisiana Revised Statutes of 1950, with each separate tract sharing in unit production in the proportion that the surface area of such tract bears to the entire surface area of said unit in which it is situated. (emphasis added)

Unit applications filed with the Office of Conservation should aid the staff in fulfilling their statutory duties to prevent waste, avoid, the drilling of unnecessary wells, and afford each tract the opportunity to recover its just and equitable share of hydrocarbons. Once the applicant defines its target geologic formation and the geographical boundaries of its unit, it must proceed through the regulatory and public notice process described hereinbelow.

IV. UNITIZATION PROCEDURE

As discussed above, orders from the Commissioner of Conservation have wide-ranging and lasting power, and it is precisely for this reason that the process to obtain an order requires extensive public notice and participation opportunities. The opportunity for public scrutiny is one of the hallmarks of the Office of Conservation unitization process. As will be discussed below, the central characteristics of Louisiana's unitization process are redundancy, public notice, and finality.

While any interested owner may file an application with the Commissioner to unitize an area around an existing or proposed well, almost all applications are filed the by operator of the proposed unit well. Nothing prohibits an operator from filing an application on its own behalf, but most applications are filed by attorneys or geological consultants working on behalf of the operator.

⁴⁶ La. Rev. Stat. Ann. § 30:10 (A)(1)(a)

⁴⁷ La. Rev. Stat. Ann. § 30:9 (D)

⁴⁸ Randall C. Songy and Louis F. Gilbert, *North vs. South: A Comparison of the Application of Louisiana Unitization Laws Across Different Areas of the State*, 53 Ann. Inst. On Min. Law, 9 (2006).

La. Rev. Stat. Ann. § 30:6 (B) provides that any application made to the Commissioner for creation of any unit for the production of oil or gas requires at least thirty (30) days' notice in the manner prescribed by the Commissioner. As such, the creation of a unit requires what is typically referred to as a "30-Day Notice Hearing." The statute allows for the Commissioner to hold "10-Day Notice" hearings for matters such as substitute or alternate unit wells. The procedure outlined below is for a typical 30-Day Notice Hearing.

Pursuant to his statutory authority under La Rev. Stat. Ann. Title 30, the Commissioner has promulgated regulations that dictate the rules of the public hearing process, which are set forth in the Louisiana Administrative Code: 43 La. Admin. Code Pt XIX, 3901. The procedure set forth hereinbelow will cover the formation of a typical compulsory unit under the Office of Conservation regulations.⁴⁹

There are certain administrative shortcuts provided within the regulations such as 43 La. Admin. Code Pt XIX, 3917 and the Critical Date Order procedure that can shorten the time period it takes to receive an order. However, for the sake of brevity, these measures will not be discussed in this paper.

a. **PRE-APPLICATION NOTICE**

The first step in the unitization process is the drafting and transmission of the Pre-Application Notice, which is essentially a letter on behalf of the operator setting forth an explanation of the nature of the unit proposal accompanied by a copy of a unit plat for each sand with any geological bases for any unit boundary labeled thereon. Please see Exhibit "A" attached for an example of a recent Pre-Application Notice. It must also contain a definition of the sand proposed for unitization with the sand defined in each reservoir by reference to well log measurements. In lieu of reference to a specific well log, the Office of Conservation allows reference to a prior field order if the proposed sand has been previously defined in the field in which the unit is proposed.

The Pre-Application Notice must be sent to: (1) the Commissioner of Conservation, (2) the District Manager for the Office of Conservation district where the unit is situated, and (3) all Interested Owners and Represented Parties as defined in the regulations. The regulations set forth three categories of parties who should receive notice:

Interested Owner--any owner as owner is defined in Title 30 of Louisiana Revised Statutes of 1950, who is known to the applicant after reasonable search to presently own an interest within the area of, or proximate to, the tracts directly affected by the application.

Interested Party--any person as person is defined in Title 30 of Louisiana Revised Statutes of 1950, other than an interested owner or a represented party as

⁴⁹ Please note that there are certain procedural requirement that differ for the creation of reservoir wide units pursuant to La. Stat. Ann. § 30:5 (C) and certain special formation rules, such as Statewide Order No. 29-S for the Austin Chalk Formation, all of which are beyond the scope of this paper.

defined herein, who presently owns an interest within the area of, or proximate to, the tracts directly affected by the application.

Represented Party--any person as person is defined in Title 30 of Louisiana Revised Statutes of 1950, who is known to the applicant after reasonable search to presently own an interest within the area of, or proximate to, the tracts directly affected by the application and who is also known to the applicant to have either a consultant or attorney representing him in conservation matters.⁵⁰

Title 30 defines the term "owner" as "the person, including operators and producers acting on behalf of the person, who has or had the right to drill into and to produce from a pool and to appropriate the production either for himself or for others." "Person" is defined as "any natural person, corporation, association, partnership, receiver, tutor, curator, executor, administrator, fiduciary, or representative of any kind."⁵¹

The three classes of parties noted above comprise the "Interested Parties List," which is typically compiled by a land service working for the operator after review of the public records in the parish. The Interested Parties list must include each of the parties listed above owning an interest in the tracts within the exterior geographical boundaries of proposed unit, and all areas "proximate to" the unit. The areas proximate to the unit are often referred to as "halo" or "buffer" acreage. Since the regulations do not define the extent of which acreage is proximate to the unit, there has been some disagreement in the past as to how much acreage the halo should encompass. In most cases, the custom has evolved to limit the halo acreage to the area onequarter of a mile from the boundary of the unit. In other instances, the halo can be up to a halfmile or greater in order to comply with the spirit of the regulations. The Interested Parties List must be sent to the Commissioner and the District Manager but can be sent to any interested The Pre-Application Notice must include a statement that a reasonable party upon request. effort has been made to determine to whom the notices required by this rule must be sent. In a similar vein, the plat accompanying the notice should be prepared in sufficient detail to enable affected parties to determine the location of their lands.

The Pre-Application Notice must also include a day, time, and place for a potential Pre-Application Conference, which must be held in a city reasonably convenient to the persons involved and shall be scheduled for not less than twenty (20) calendar days following the date of the Pre-Application Notice. However, the Pre-Application Conference is only held if the applicant receives a request for the conference with ten (10) days after the date of the Pre-Application Notice. If no request is received within that time frame, then no conference is held and the applicant can immediately proceed with filing its Hearing Application.

b. PRE-APPLICATION CONFERENCE

If any interested owner, interested party, or represented party desires to confer about the applicant's proposal set forth in the Pre-Application Notice, he should advise the applicant of his

⁵⁰ 43 La. Admin. Code Pt XIX, 3903

⁵¹ La. Rev. Stat. Ann. § 30:3

desire to confer within the ten-day time period discussed above. Thereafter, the applicant must notify the Commissioner, the District Manager and the entire Interested parties List that the conference will be held. Any interested owner, interested party, and/or represented party may attend and participate in the Pre-Application Conference, even if they are not the party that requested the conference.

The Pre-Application Conference is intended to serve as an initial discussion of the unit proposal in order to resolve potential conflicts and mitigate the possibility for a contested hearing later in the process. ⁵² At the conference, the applicant must present the geological, engineering or other bases for his proposal "supported by sufficient data and detail for the conferees to have reasonable opportunity to discuss and attempt to resolve their differences in good faith." Further, any opponent or party supporting the applicant, who has developed the geological, engineering or other bases for his opposition or support, shall present his position in sufficient detail to permit the parties to attempt to resolve the differences in good faith."⁵³ If the opponent is not prepared to present a counterplan at the time of the conference, he has an opportunity later in the process to do so. The regulations provide that the conferences are "designed to promote an open exchange of views among the parties." To that end, any reference to discussions among the parties as to geological, engineering, or other bases for a party's position at the conferences are not admissible in evidence at the hearing. When the applicant submits his Hearing Application, he must include a conference report but said report can be limited to a statement of whether or not there is disagreement among the parties, indicate the issues that are likely to be controverted, and the number of parties likely to present opposing plans.

c. HEARING APPLICATION

The Hearing Application may be filed immediately after the Pre-Application Conference or the expiration of the ten-day period following the Pre-Application Notice, with a copy being sent to the Interested Parties List. The content of the Hearing Application is very similar to the Pre-Application Notice, with the main exception being the statement of conference, if applicable. The Hearing Application must also be accompanied by the required hearing fee as per current regulations. Please see Exhibit "B" attached for an example of a recent Hearing Application.

Upon receipt of the Hearing Application, the Office of Conservation staff reviews the proposal and schedules the hearing in accordance with the necessary time period for notice and advertisement. The Office of Conservation will send the applicant a "Legal Notice" within a few days of the Hearing Application submission. The Legal Notice reiterates the applicant's proposal along with the time and place of the hearing. Please see Exhibit "C" attached for an example of a recent Legal Notice. The date of the hearing is scheduled to allow for the applicant to comply with the 30-day notice provisions of the regulations. The Office of Conservation arranges for the Legal Notice to be published in the official state journal, which is the "The Advocate" newspaper in Baton Rouge.

⁵² Philip N. Asprodites, *Conservation Practice*, LOUISIANA MINERAL LAW TREATISE, Chapter 15, § 1507 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012).

⁵³ 43 La. Admin. Code Pt XIX, 3913

Upon receipt of the Legal Notice from the Office of Conservation, the applicant must take the following steps in the public notice process:

1. **POSTING** of a copy of the Legal Notice of the hearing and unit plat in a prominent place in the area affected (typically a courthouse bulletin board).

2. **PUBLISHING** a copy of the Legal Notice in a newspaper published in the vicinity of the affected field at least 15 days before the hearing (the official parish journal where the unit is located, as designated by the Secretary of State).

3. **MAILING** copies of the Legal Notice to all interested owners, represented parties and interested parties.

The applicant must submit evidence to the Office of Conservation to establish posting, publishing and mailing in compliance with the regulations at the hearing, which comes in the form of affidavits attesting to same.

If an opposing party wishes to present a formal counterplan, it must submit its plan during this notice period but not less than fifteen (15) calendar days before the hearing. The counterplan must be submitted to the Commissioner, the District Manager, the applicant, and all persons who attended the Pre-Application Conference, and must include a plat of his proposed units, accompanied by a letter explaining any points of difference with the applicant's plan.

If it appears that a contested hearing is a possibility, the Commissioner may also request a "Commissioner's Conference" at any time prior to the hearing in order to resolve or narrow the issues in controversy or assist in the conduct of the hearing.

d. HEARING

The Hearing is held on the date set forth in the Legal Notice. Hearings are held every Tuesday morning at 9:00 am at the LaSalle Building in downtown Baton Rouge, with the exception of holidays and certain weeks set aside periodically by the Conservation staff. Traditionally, the Commissioner of Conservation presides over the Hearing, accompanied by a panel of the Office of Conservation engineers, geologists, and on occasion, an Office of Conservation attorney.

On the day of the Hearing, the docket is called and set, and each applicant is allowed to come forth and present the entire geological, engineering or other bases for its proposal. This presentation is typically made by the applicant's attorney, who provides an introductory statement of the applicant's proposal, offering into evidence the exhibits and affidavits of posting, publication and mailing, and a statement of conference, whether or not one was held. The attorney then proceeds with a direct examination of the applicant's expert geologist or engineer, in which various technical exhibits are presented in support of the applicant's proposal. The exhibits presented include electric logs of the well defining the unit sand, structure maps identifying geologically significant wells and the basis for the unit boundaries, the unit plat, and

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pressure comparisons in the case of alternate unit wells.⁵⁴ Once the exhibits and testimony have been concluded, the applicant's expert is subject to cross-examination by the Office of Conservation staff.

Thereafter, any party who has submitted a counterplan may come forth and present its proposal in a similar manner. In the case of a contested hearing, both parties' experts are subject to cross-examination by the Conservation staff and the opposing party.

The presiding officer then allows any person at the hearing to make a statement at the hearing in support or opposition of the application, or simply ask questions. If the party wishes to introduce technical data, that party will be subject to being sworn and cross examined. The applicant is then given the opportunity to make a final closing statement.

e. THE ORDER

Following the Hearing, the Commissioner and his staff take the application under advisement. The applicant is allowed to submit to the staff a proposed form of order along with a copy of the unit plat. The Office of Conservation typically issues an order within four to six weeks of the hearing date, depending on the issues involved and workload of the Conservation staff. However, to the benefit of the applicant, the effective date of the order issued by the Commissioner is retroactive back to the date of the Hearing. After issuance of the order, the applicant must file and record the unit order in the conveyance records of the parish in which the unit is located and provided a certified copy of same to the Office of Conservation. Please see Exhibit "D" attached for an example of a recent Office of Conservation Order creating new units.

f. REHEARING AND JUDICIAL REVIEW

After the issuance of an order from the Commissioner, if a party believes that the order should be reconsidered, the Louisiana Administrative Procedures Act provides a rehearing mechanism for the aggrieved party, who must exercise his right to rehearing within ten (10) days from the date of entry of the order.⁵⁵

The party calling for rehearing, reopening, or reconsideration of the order must assert one of the following grounds for the action:

(1) The decision or order is clearly contrary to the law and the evidence;

(2) The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing;

(3) There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter; or

⁵⁴ Philip N. Asprodites, *Conservation Practice*, LOUISIANA MINERAL LAW TREATISE, Chapter 15, § 1507 (Martin, ed., Claitor's Law Books & Publishing Division, Inc. 2012).

⁵⁵ La. Rev. Stat. Ann. § 49:959

(4) There is other good ground for further consideration of the issues and the evidence in the public interest.⁵⁶

Louisiana courts have held that the Office of Conservation is an "agency" within the meaning of the Administrative Procedure Act and that a unitization order issued by the Commissioner of Conservation as a result of a public hearing is an "adjudication" under La. Rev. Stat. Ann. § 49:951(1).⁵⁷

However, the jurisprudence shows that depending on the facts of the case there are situations when the rehearing mechanism of La. Rev. Stat. Ann. § 49:959(A) would not control, and the parties would need to rely on the hearing procedure of La. Rev. Stat. Ann. § 30:6.⁵⁸

The distinction noted in the relevant case law hinges on whether the two statutes confer "parallel and co-existing" methods of seeking reconsideration of an order of the Commissioner of Conservation. La. Rev. Stat. Ann. § 30:6 requires the Commissioner to call a hearing whenever one is requested by an interested person. LSA-R.S. 49:959(A) requires that a rehearing from an administrative order be requested within ten days from the date of its entry. These statutes do not provide alternative methods of seeking reconsideration. La. Rev. Stat. Ann. § 30:6 envisions a situation where the Commissioner's authority is invoked on an issue which he has previously not addressed. La. Rev. Stat. Ann. § 49:959(A) deals with attempts to have an administrative agency reconsider a matter already adjudicated. A determination of whether an application for hearing is an original invocation of the Commissioner's authority or a request for rehearing and reconsideration of a matter already adjudicated is determined on a case-by-case basis.

If a party seeks to have the Commissioner review an order that was issued after a full hearing and fact-finding process, then he should pursue the rehearing process under La. Rev. Stat. Ann. § 49:959(A). The court in *Jordan* held that "[a] contrary conclusion would give a disgruntled party the right to compel the Commissioner of Conservation to hold repeated hearings, ad infinitum, for the purpose of reconsidering an order."⁵⁹ However, time is of the essence in such filings. If a party fails to timely request a rehearing, courts have held they are not entitled to a rehearing under the terms of La. Rev. Stat. Ann. § 49:959(A).

If an aggrieved party has exhausted his administrative remedies through La. Rev. Stat. Ann. § 49:959(A) or if his grounds for dispute do not meet one of the threshold grounds of the Administrative Procedures Act listed above, he may seek judicial review pursuant to La. Rev. Stat. Ann. § 30:12. This statute provides, in pertinent part:

A. (1) A person who is aggrieved by any law of this state with respect to conservation of oil or gas, or both, or ... by a rule, regulation, or order made by the assistant secretary of the office of conservation hereunder, ... and who has

⁵⁶ Id.

⁵⁷ Jordan v. Sutton, 411 So. 2d 1170, 1172 (La. App 1st Cir. 1982), writ denied, 414 So. 2d 388 (La. 1982); See La. Rev. Stat. Ann. § 49:951(2).

⁵⁸ See Jordan v. Sutton, 401 So.2d 389 (La. App. 1st Cir. 1981).

⁵⁹ *Id.* at 1173.

exhausted his administrative remedy, may obtain court review by a suit for injunction or judicial review against the assistant secretary as defendant.

(2) Suit for review ... must be brought within sixty days of the administrative action that is the subject of the suit. In cases of judicial review of adjudication proceedings, the sixty days shall begin to run after mailing of notice of the final decision or order, or if a rehearing is requested within sixty days after the decision thereon.

Considering La. Rev. Stat. Ann. § 49:959(A) above, the statute expressly contemplates that judicial review of adjudication proceedings before the Commissioner may be obtained whether or not the plaintiff has applied for a rehearing.

Under La. Rev. Stat. Ann. § 30:12, judicial review of a Commissioner's adjudication is conducted by a judge without a jury and is confined to the record, but the parties can petition the court for leave to present additional evidence if said evidence is shown to be material. The court may affirm the decision of the Commissioner or remand the case for further proceedings. The court may reverse or modify the order if it finds that the rights of the appellant have been prejudiced because the administrative decision is:

(a) In violation of constitutional or statutory provisions;

- (b) In excess of the statutory authority of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;

(e) Arbitrary or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(f) Manifestly erroneous in view of the reliable, probative, and, substantial evidence on the whole record. In the application of the rule, where the assistant secretary has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the assistant secretary's determination on credibility issues. (emphasis added)

When challenging an order, the burden of proof is expressly on the plaintiff, and all pertinent evidence with respect to the validity or reasonableness of the order of the Commissioner is admissible. The Commissioner's order is awarded the presumption of "prima facie" validity. This presumption cannot be overcome simply by means of a verified petition or affidavit.⁶⁰ Furthermore, Louisiana courts have refused to substitute their discretion or judgment

⁶⁰ Louisiana Environmental Action Network v. Welsh, 16-0906 (La.App. 1 Cir. 6/14/17), 224 So.3d 383, 386.

for that of the Commissioner in the absence of evidence showing the Commissioner's action to be arbitrary. The First Circuit recently described this principle:

Where the Commissioner has the opportunity to judge the credibility of witnesses by first-hand observation of their demeanor on the witness stand and the reviewing court does not, due regard must be given to the Commissioner's credibility determinations. Further, in reviewing the Commissioner's conclusions and exercises of discretion, the reviewing court must apply the arbitrariness test, and the party challenging the Commissioner's decision must make a clear showing that the administrative action was arbitrary and capricious. Moreover, the court is not empowered to substitute its judgment for that of the Commissioner. In other words, if the Commissioner's decision has a rational basis in the administrative record, it should be upheld.⁶¹

To this author's knowledge, the heavy burden of proof regarding the presumption of validity of a Commissioner's order has never been overcome in a judicial proceeding, which discourages the filing of such suits.⁶²

Even if such a suit is filed, the law requires that that suits challenging the order of the Commissioner must be brought within sixty (60) days of issuance. This temporal requirement provides the applicant with the security and finality needed to commence its operations with an order it may rely on without further challenge. If Commissioner's orders had no such finality after the sixty-day period, the unitization procedure outlined above and the order itself would hold little weight. The finality of the order allows the operator to make financial decisions regarding its investment with confidence. As described in the early portions of this paper, unit orders significantly affect mineral lease and mineral servitude maintenance. Third parties rely upon unit orders when evaluating the public records for the mineral and leasehold title to property.⁶³ Therefore, the finality of the unit order provides the operator, the affected landowners, and third parties with the security that the equities established within the unit will not be challenged.

The finality of the Commissioner's orders afforded under the provisions of La. Rev. Stat. Ann. § 30:12 was evidenced in the Louisiana Supreme Court case of *Gatti v. State ex rel. Office* of Conservation.⁶⁴ The *Gatti* case involved a class action filed April 8, 2010, by large group of north Louisiana landowners against the State of Louisiana, Office of Conservation and Commissioner James H. Welsh, along with eighteen (18) Haynesville Shale operators named as defendants.

⁶¹ *Hill v. Welsh*, 20-0887 (La. App. 1 Cir. 4/16/21), 324 So. 3d 673, 678, writ denied sub nom. *Heirs of Hill v. Welsh*, 21-00702 (La. 9/27/21), 324 So. 3d 93.

 ⁶² See also Raymond Lloyd Brown, Jr., Judicial Review of Conservation Orders, 43 La. L. Rev. 1201, 1206 (1983).
⁶³ Id.

⁶⁴ 14-888 (La. 8/25/14), 146 So. 3d 541.

In particular, the petition targeted the creation of units and designation of alternate unit wells in the Haynesville Shale by the Commissioner of Conservation. Plaintiffs cited of La. Rev. Stat. Ann. § 30:9(B), which at the time defined a drilling unit as "the maximum area which may be efficiently and economically drained by **one well**." The plaintiffs sought a declaratory judgment decreeing that there are only limited instances in which the Commissioner has the authority to establish a unit having an area in excess of the area drainable by one well and the purported creation of a unit having an area in excess of the area drainable by one well is null and void. They further sought a declaration that alternate wells are: (1) not authorized by the statute, (2) beyond the legal authority granted to the Commissioner, and (3) violate La. Rev. Stat. Ann. § 30:9(B).

The plaintiffs alleged that operators had a duty to apply for a unit boundary to accord with well data for one lateral well. The plaintiffs argued that the operators violated that duty by applying for permits to drill "alternate unit wells," thus seeking multi-well units. The Commissioner issued the orders and granted the permits for alternate unit wells, they argued, allegedly exceeding his limited statutory authority mandating one-well units.

The defendants countered the declaratory judgment claim on procedural grounds, including:

- 1. There is no provision for a declaratory judgment action in La. R.S. 30:12 and therefore it is not an available remedy.
- 2. A trial court lacks subject matter jurisdiction to review the Commissioner's actions in any manner other than that set forth in La. R.S. 30:12.
- 3. The plaintiffs' attack on the orders of the Commissioner constituted an impermissible collateral attack.
- 4. The plaintiffs failed to exhaust the administrative procedures set forth in the Conservation Act prior to filing suit, including La. R.S. 30:6(F), which gives plaintiffs the right to petition the Commissioner to call a hearing to consider revising any order.
- 5. La. R.S. 30:12(A)(2) requires that any suit for review of the Commissioner's orders be brought within 60 days of the administrative action, and any challenge to any order more than 60 days old must be dismissed as untimely.

The defendants asserted that the plaintiffs' claims constituted an impermissible collateral attack on the Commissioner's orders and were premature because plaintiffs did not exhaust administrative remedies set forth in La. Rev. Stat. Ann. § 30:12.

The trial court dismissed the plaintiffs' claims on procedural grounds, most notably that La. Rev. Stat. Ann. § 30:12 is the exclusive means of review of the Commissioner's orders and that the plaintiffs' claims were an improper and untimely collateral attack on the orders of the Commissioner. The trial court noted that La. Rev. Stat. Ann. § 30:12 provides the procedure for appealing any decision of the Commissioner of Conservation and requires that any review of

orders must be filed within sixty (60) days of the issuance of the order. The plaintiffs' petition attacked Commissioner's orders that had been issued years before the filing of the action.

The First Circuit Court of Appeal reversed the trial court's judgment and held that La. Rev. Stat. Ann. § 30:12 was not the sole means by which to achieve judicial review of a Conservation Order.

The defendants filed writ applications with the Louisiana Supreme Court arguing that the Court of Appeal's decision was contrary to established state law and procedure, and further argued that the appellate court's holding that La. Rev. Stat. Ann. § 30:12 was not the exclusive means for reviewing orders of the Commissioner would strip administrative orders of finality and have wide-ranging consequences regarding both Conservation orders and those issued by other State agencies.

The Supreme Court granted the writ applications and, without any oral argument or additional briefing from the parties, entered a per curiam order reversing the decision of the First Circuit and reinstated the decision of the trial court dismissing the plaintiffs' claims.

Following the disposition of the *Gatti* case, Senator Robert Adley introduced Senate Bill 88 of the 2015 Regular Session, which was ultimately enacted as Acts No. 253 of 2015. The first function of Act 253 was to amend La. Rev. Stat. Ann. § 30:9 (B) to redefine a "drilling unit" as follows:

B. ... A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one the well or wells designated to serve the drilling unit as the unit well, substitute unit well, or alternate unit well. This unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities.

Act No. 253 modified the definition of a drilling unit from the maximum area drained by "one well" to the maximum area drained by "the well or wells" designated to serve the drilling unit. The Act went further to specifically delineate the various categories of well as the unit well, substitute unit well, or alternate unit well. By allowing for the designation of multiple wells to serve one drilling unit, the Act essentially undercut the central proposition of the *Gatti* plaintiffs that a 640-acre Haynesville Shale unit could not be drained by one well.

V. CROSS-UNIT WELLS

To date, the Commissioner of Conservation has created almost 2400 drilling and production units for the Haynesville Zone upon the application of various operators. A vast majority of the units followed the spacing pattern of square mile governmental sections (640 acres). Shortly after the birth of the play, the price of natural gas plummeted, which forced operators to seek out methods to maximize efficiency and costs. They quickly determined that drilling longer lateral wells would improve the economics of Haynesville Shale development.

Statewide Order No. 29-E mandates a setback of 330 feet from unit boundaries, thus limiting the operator in a 640-acre unit to drilling a lateral of roughly 4,600 feet and leaving 660-

foot strips of undeveloped acreage in the buffer zones along unit boundaries. In order to maximize recovery from the formation, operators wished to develop the shale within these "buffer zones" and drill longer laterals. This would also allow them to drill multiple units from a single location in order to reduce drilling costs and environmental footprint. Since most Haynesville Shale units were already in production, the Commissioner refused to redraw existing units in order to accommodate longer laterals. To dissolve and reform units would change the equities of these units in light of existing production and betray the theme of finality discussed hereinabove. Instead, operators requested authority to drill horizontal wells across unit lines and complete the wells within multiple units.

On November 2, 2012, the Commissioner of Conservation issued a Memorandum addressing "Horizontal Cross Unit Lateral Wells in Shales, Tight Gas Sands and Unconventional Reservoirs." The memorandum sets forth the internal policy of the Office of Conservation governing the application for and docketing of administrative hearings to consider horizontal cross unit lateral wells, and also the manner in which production proceeds are allocated to owners within each unit penetrated by the cross-unit lateral well. Please see Exhibit "E" for a copy of this memorandum.

The Memorandum places additional burdens on applicants during the application and hearing process, most notably that the applicant for a horizontal cross unit lateral well must present evidence at the hearing of the consent of the majority of owners having the right to drill (both working interest owners, and if applicable, unleased landowners and/or unleased mineral owners) for each unit penetrated by the proposed cross-unit lateral wells, and including the consent of the current unit operators of all units penetrated by the proposed cross-unit lateral wells.

The Memorandum required that production from each cross-unit lateral well shall be separate and metered individually and this information shall be reported to the Office of Conservation. To solve the problem of allocation of production, the Commissioner stated that unit production from each cross-unit lateral well will be allocated to each unit in the same proportion as the perforated length of the lateral in each unit bears to the total length of the perforated lateral as determined by an "as drilled" survey performed after the cross-unit well is drilled and completed. The perforated length of lateral was defined as the length of horizontal lateral wellbore wherein perforations have been made, regardless of the number of perforated stages or individual perforations, which is measured from the lesser measured depth perforations." Please see Exhibit "F" attached hereto for an example of a Commissioner's Order authorizing cross-unit wells.

It did not take long for cross unit well development to attract the ire of certain landowners and legislators, as demonstrated by Senate Bill 462 introduced during the 2014 legislative session. SB 462 as originally proposed would have prohibited cross unit horizontal wells by amending La. Rev. Stat. Ann. § 30:4 to add Section N which would have provided: "The Commissioner shall not authorize or issue any permit that allows the drilling of any well located closer than three hundred thirty feet from the property boundary of a drilling unit or lease."⁶⁵

Through legislative compromise and revision, SB 462 evolved into Act No. 394 of 2014. Act 394 authorized the creation of the "Cross-Unit Well Study Commission" within the Department of Natural Resources. The scope of this commission was limited to study the legal implications of the prescription of nonuse in relation to the drilling of a well under an exception to the spacing rules of Statewide Order No. 29-E.

The work of the Cross Unit Well Study Commission became Senate Bill 88 of the 2015 Regular Session, which became Act 253 of 2015. The cross unit well study commission was responsible for the amendment to La. Rev. Stat. Ann. § 30:9(B) discussed above that redefined the definition of a drilling unit in the wake of the *Gatti* decision to allow for more than one well. The act also while expressly authorized cross-unit wells, while imposing certain limitations on the Commissioner's authority to permit such a well if it has less than 500 feet of perforated lateral within a unit.

The Act became memorialized as La. Rev. Stat. Ann. § 30:9.2, the entirety of which is reproduced below:

A. The following definitions shall apply where used in this Section:

(1) "Cross-unit person" means an interested owner, interested party, or represented party as defined in LAC 43:XIX, other than a mineral lessee.

(2) "Cross-unit well" means a well drilled horizontally and completed under multiple drilling units that is designated by the commissioner after notice and public hearing to serve as a unit well, substitute unit well, or alternate unit well for said units.

(3) "Short unit" means a unit in which the proposed well shall have less than five hundred feet of perforated lateral.

(4) "Timely objection" means an objection mailed to the commissioner and the applicant at least fifteen days prior to the application hearing.

B. The commissioner is authorized to permit the drilling of cross-unit wells as provided in this Section.

C. The commissioner shall not authorize or permit a cross-unit well that is proposed to have less than five hundred feet of perforated lateral in any unit to be served by the cross-unit well if one of the following occurs:

⁶⁵ Wm. Timothy Allen, III., *Recent Developments Related to Louisiana Unitization and Drilling*, 62 Ann. Inst. On Min. Law (2015).

(1) The preapplication notice and hearing application do not expressly set forth the cross-unit person's right to object to the application.

(2) A timely objection is filed by a cross-unit person who owns an interest in a short unit and, on the date of the application hearing, the short unit either is not producing or is producing only from one or more horizontal laterals with a combined length of perforated lateral less than five hundred feet.

To summarize La. Rev. Stat. Ann. § 30:9.2, the Commissioner may authorize a cross-unit well, but if the horizontal lateral will extend less than 500 feet into a "short unit," the Commissioner cannot approve the well if: (1) the operator's Pre-Application Notice and Hearing Application fail to state that cross unit persons may file an objection; or (2) a cross-unit person with an interest in the short unit timely files an objection, and on the date of the hearing the short unit does not have at least 500 feet of producing lateral within the unit.

In the recent years, the Commissioner has permitted the use of cross-unit wells in areas beyond the Haynesville Shale, such as the Lower Cotton Valley Sand in various fields, the Gray Sand in the Terryville Field, and the Austin Chalk Formation in certain fields. However, the Office of Conservation has limited practice to shales, tight gas sands, and unconventional reservoirs pursuant to the Commissioner's 2012 Memorandum.

CONCLUSION

Over the recent decades, Louisiana's regulation of oil and gas development has evolved with changes in the industry without major revisions to the regulatory process. This should stand as a testament to the stability created by the existing statutory and regulatory regime under which the Commissioner of Conservation serves. While the system is not without fault, for better or worse the system provides a structured venue for oil and gas operators to create units and for owners affected by the unit to participate in the process.



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July 31, 2020

Honorable Richard P. Ieyoub Commissioner of Conservation Office of Conservation P. O. Box 94275 Baton Rouge, Louisiana, 70804-9275

RE: **<u>PRE-APPLICATION NOTICE</u>**

Haynesville Zone, Reservoir A San Miguel Creek Field Natchitoches Parish, Louisiana

Dear Sir:

INDIGO MINERALS LLC hereby gives notice of its intention to apply for a public hearing, after legal notice, to consider evidence relative to the issuance of one or more orders pertaining to the following matters in the **San Miguel Creek Field**, Natchitoches Parish, Louisiana:

1. To create two (2) additional drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A in the San Miguel Creek Field, Natchitoches Parish, Louisiana, with said additional units to be designated HA RA SU58 and HA RA SU59.

2. To force pool and integrate all separately owned tracts, mineral leases, and other property interests within the proposed units with each tract sharing in unit production on a surface acreage basis of participation.

3. To authorize Indigo Minerals LLC to drill, designate, and utilize four (4) cross unit horizontal wells, with one (1) well serving as the unit well for the HA RA SU58 and HA RA SU59 and three (3) wells to serve as alternate unit wells for the HA RA SU58 and HA RA SU59, at the locations and in the general manner shown on the plat attached hereto or at any legal location within the respective units, and to approve an exception to the spacing provisions of Office of Conservation Order Nos. 1165-K, provided that each of said proposed cross unit horizontal wells will be perforated no closer than 330 feet from any unit boundary, other than the common boundary between the HA RA SU58 and the HA RA SU59.

4. To find that the proposed horizontal wells are necessary to efficiently and economically drain a portion of the Haynesville Zone, Reservoir A, underlying the unit or units on which it is proposed to be drilled which cannot be efficiently and economically drained by any existing well on such unit(s), will prevent waste, avoid the drilling of unnecessary wells, protect correlative rights and promote the full and efficient development of the natural resources of this state.

5. To provide that if the horizontal portion of a well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and offset well(s) will be calculated based on the distance to the nearest perforation in the well and not on the penetration point or terminus of the well.

6. To provide that production from the cross unit wells shall be separated and metered individually and that this information shall be reported in the manner prescribed the Office of Conservation.

7. To provide that the unit allowables for the affected units may be produced from the unit well, from any alternate unit well, or from any combination of such wells serving the unit, at the discretion of the operator.

8. To provide that production from a cross unit horizontal well shall be allocated to each unit penetrated by the well in the same proportion as the perforated length of the lateral in each such unit bears to the total length of the perforated lateral as determined by an "as drilled" survey performed after the well has been drilled and completed.

9. Except insofar as set forth above, to confirm and continue in full force and effect the provisions of Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, the units created thereby, and of all applicable Statewide Orders.

10. To consider such other matters as may be appropriate and justified by the evidence presented at the hearing.

The Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Natchitoches Parish, Louisiana, was defined in Office of Conservation Order No. 1165-K, effective October 28, 2008.

As relates to each of the proposed cross unit horizontal wells, Applicant will present evidence at the hearing of the consent and approval of a majority of the working interest owners in each of the units to be penetrated by the well, and will be the operator of each of the units to be penetrated by the wells.

Any pertinent data, including well logs, not available at the Office of Conservation, may be obtained at the cost of the requesting party from Mr. David Comeaux of Leon E. Comeaux & Associates, 305 LaRue France, Lafayette, Louisiana, 70508, (337) 233-9839.

A conference to discuss this application and any opposition thereto is hereby tentatively scheduled for Wednesday, August 19, 2020, at 10:30 am at the Holiday Inn Express & Suites, 5137 University Pkwy, Natchitoches, Louisiana, 71457, (318) 354-9911. This conference will not be held unless a specific request to hold said conference is made to the undersigned party,

Commissioner of Conservation July 31, 2020 Page 3

either by telephone or in writing, by an Interested Owner or Represented Party receiving a copy of this notice within ten (10) calendar days after the date hereof. In the event this conference is requested, all parties receiving a copy of this notice will be notified in writing that such conference will be held. When calling in regard to this notice, please refer to File No. 200090.

There is attached hereto and made a part hereof a plat depicting the affected units and the general location of the proposed cross unit wells. Also attached hereto and made a part hereof is a list of the names and addresses of the Interested Owners, Interested Parties and Represented Parties to whom a copy of this Pre-Application Notice is being mailed. Pursuant to the Rules of Procedure, the list of parties is being furnished only to the Commissioner of Conservation and to the District Manager of the Office of Conservation. However, the list of parties will be furnished to any party requesting copies. A reasonable effort has been made to determine that the enclosed list includes all persons to whom this notice must be sent under the Rules of Procedure.

Sincerely,

PATTON LAW FIRM, LLC

By: Scott R. Patton

SRP/jh Enclosures

cc: Mr. Jackie DeVall, District Manager, Office of Conservation – Shreveport Division Interested Parties, Represented Parties, and Interested Owners

To all Interested Owners, Represented Parties, and Interested Parties:

You have received this Pre-Application Notice because the Rules of Procedure require us to attempt to notify everyone owning an interest within the area of, or proximate to, the tracts affected by the application. Your receipt of this Pre-Application Notice does not require you to take any action. It is meant to notify you of these proceedings so that you have the opportunity to participate if you so desire.





Scott R. Patton MEMBER Phone: 225.412.0277 spatton@pattonfirm.com



521 Laurel Street, Suite A Baton Rouge, LA 70801

pattonfirm.com

August 11, 2020

Honorable Richard P. Ieyoub Commissioner of Conservation Office of Conservation P. O. Box 94275 Baton Rouge, Louisiana, 70804-9275

RE: HEARING APPLICATION

Haynesville Zone, Reservoir A San Miguel Creek Field Natchitoches Parish, Louisiana

Dear Sir:

On behalf of INDIGO MINERALS LLC, application is hereby made for a public hearing, after legal notice, to consider evidence relative to the issuance of an order or orders pertaining to the following matters in the San Miguel Creek Field, Natchitoches Parish, Louisiana:

1. To create two (2) additional drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A in the San Miguel Creek Field, Natchitoches Parish, Louisiana, with said additional units to be designated HA RA SU58 and HA RA SU59.

2. To force pool and integrate all separately owned tracts, mineral leases, and other property interests within the proposed units with each tract sharing in unit production on a surface acreage basis of participation.

3. To authorize Indigo Minerals LLC to drill, designate, and utilize four (4) cross unit horizontal wells, with one (1) well serving as the unit well for the HA RA SU58 and HA RA SU59 and three (3) wells to serve as alternate unit wells for the HA RA SU58 and HA RA SU59, at the locations and in the general manner shown on the plat attached hereto or at any legal location within the respective units, and to approve an exception to the spacing provisions of Office of Conservation Order Nos. 1165-K, provided that each of said proposed cross unit horizontal wells will be perforated no closer than 330 feet from any unit boundary, other than the common boundary between the HA RA SU58 and the HA RA SU59.

Commissioner of Conservation August 11, 2020 Page 2

4. To find that the proposed horizontal wells are necessary to efficiently and economically drain a portion of the Haynesville Zone, Reservoir A, underlying the unit or units on which it is proposed to be drilled which cannot be efficiently and economically drained by any existing well on such unit(s), will prevent waste, avoid the drilling of unnecessary wells, protect correlative rights and promote the full and efficient development of the natural resources of this state.

5. To provide that if the horizontal portion of a well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and offset well(s) will be calculated based on the distance to the nearest perforation in the well and not on the penetration point or terminus of the well.

6. To provide that production from the cross unit wells shall be separated and metered individually and that this information shall be reported in the manner prescribed the Office of Conservation.

7. To provide that the unit allowables for the affected units may be produced from the unit well, from any alternate unit well, or from any combination of such wells serving the unit, at the discretion of the operator.

8. To provide that production from a cross unit horizontal well shall be allocated to each unit penetrated by the well in the same proportion as the perforated length of the lateral in each such unit bears to the total length of the perforated lateral as determined by an "as drilled" survey performed after the well has been drilled and completed.

9. Except insofar as set forth above, to confirm and continue in full force and effect the provisions of Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, the units created thereby, and of all applicable Statewide Orders.

10. To consider such other matters as may be appropriate and justified by the evidence presented at the hearing.

The Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Natchitoches Parish, Louisiana, was defined in Office of Conservation Order No. 1165-K, effective October 28, 2008.

As relates to each of the proposed cross unit horizontal wells, Applicant will present evidence at the hearing of the consent and approval of a majority of the working interest owners in each of the units to be penetrated by the well, and will be the operator of each of the units to be penetrated by the wells.

Any pertinent data, including well logs, not available at the Office of Conservation, may be obtained at the cost of the requesting party from Mr. David Comeaux of Leon E. Comeaux & Associates, 305 LaRue France, Lafayette, Louisiana, 70508, (337) 233-9839.

A Pre-Application Notice dated July 31, 2020, was circulated in connection with this matter. No request for a Pre-Application Conference was received by the undersigned, and accordingly, **NO PRE-APPLICATION CONFERENCE WILL BE HELD.**

Commissioner of Conservation August 11, 2020 Page 3

There is attached hereto and made a part hereof a plat depicting the affected units and the general location of the proposed cross unit wells. Also attached hereto and made a part hereof is a list of the names and addresses of the Interested Owners, Interested Parties and Represented Parties to whom a copy of this Hearing Application is being mailed. Pursuant to the Rules of Procedure, the list of parties is being furnished only to the Commissioner of Conservation and to the District Manager of the Office of Conservation. However, the list of parties will be furnished to any party requesting copies. A reasonable effort has been made to determine that the enclosed list includes all persons to whom this notice must be sent under the Rules of Procedure. Enclosed with the copy of this letter being sent to the Commissioner of Conservation is a check for the appropriate application fee.

Sincerely,

PATTON LAW FIRM, LLC

Scott R. Patton

SRP/jh Enclosures

cc: Mr. Jackie DeVall, District Manager, Office of Conservation – Shreveport Division Interested Parties, Represented Parties, and Interested Owners

To all Interested Owners, Represented Parties, and Interested Parties:

You have received this Hearing Application because the Rules of Procedure require us to attempt to notify everyone owning an interest within the area of, or proximate to, the tracts affected by the application. Your receipt of this Hearing Application does not require you to take any action. It is meant to notify you of these proceedings so that you have the opportunity to participate if you so desire.

Regulatory Comparison



EXHIBIT "C

SAN MIGUEL CREEK FIELD

20-300

LEGAL NOTICE

STATE OF LOUISIANA, OFFICE OF CONSERVATION, BATON ROUGE, LOUISIANA.

In accordance with the laws of the State of Louisiana, and with particular reference to the provisions of Title 30 of Louisiana Revised Statutes of 1950, a public hearing will be held in the Hearing Room, 1st Floor, LaSalle Building, 617 North 3rd Street, Baton Rouge, Louisiana, at 9:00 a.m. on **TUESDAY**, **SEPTEMBER 22**, **2020**, upon the application of **INDIGO MINERALS LLC**.

At such hearing the Commissioner of Conservation will consider evidence relative to the issuance of Orders pertaining to the following matters relating to the **Haynesville Zone**, **Reservoir A**, in the San Miguel Creek Field, Natchitoches Parish, Louisiana.

- 1. To create two additional drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A.
- 2. To force pool and integrate all separately owned tracts, mineral leases and other property interest within the proposed units with each tract sharing in unit production on a surface acreage basis of participation.
- 3. To authorize Indigo Minerals LLC to drill, designate and utilize four cross unit horizontal wells, with one well serving as the unit well for HA RA SU58 and HA RA SU59 and three wells to serve as alternate unit wells for HA RA SU58 and HA RA SU59, at the locations and in the general manner shown on the plat submitted with the application, or at any legal location within the respective units, and to approve an exception to the spacing provisions of Office of Conservation Order No. 1165-K, provided that each of said proposed cross unit horizontal wells will be perforated no closer than 330' from any unit boundary, other than the common boundary between the HA RA SU58 and HA RA SU59.
- 4. To find that the proposed horizontal wells are necessary to efficiently and economically drain a portion of the Haynesville Zone, Reservoir A, underlying the unit or units on which it is proposed to be drilled which cannot be efficiently and economically drained by any existing well on such unit(s), will prevent waste, avoid the drilling of unnecessary wells, protect correlative rights and promote the full and efficient development of the natural resources of this state.
- 5. To provide that if the horizontal portion of a well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and offset well(s) will be calculated based on the distance to the nearest perforation in the well and not on the penetration point or terminus of the well.
- 6. To provide that production from the cross unit wells shall be separated and metered individually and that this information shall be reported in the manner prescribed by the Office of Conservation.
- 7. To provide that the unit allowables for the affected units may be produced from the unit well, from any alternate unit well, or from any combination of such wells serving the unit, at the discretion of the operator.
- 8. To provide that production from a cross unit horizontal well shall be allocated to each unit penetrated by the well in the same proportion as the perforated length of the lateral in each such unit bears to the total length of the perforated lateral as determined by an "as drilled" survey performed after the well has been drilled and completed.
- 9. Except insofar as set forth above, to confirm and continue in full force and effect the provisions of Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, the units created thereby, and of all applicable Statewide Orders.
- 10. To consider such other matters as may be pertinent.

The Haynesville Zone, Reservoir A was defined in Order No. 1165-K, effective October 28, 2008.

A plat is available for inspection in the Office of Conservation in **Baton Rouge** and **Shreveport**, Louisiana. http://dnr.louisiana.gov/conshearings

All parties having interest therein shall take notice thereof.

BY ORDER OF:

RICHARD P. IEYOUB COMMISSIONER OF CONSERVATION

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Baton Rouge, LA

8/18/20;8/21/20

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IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT, IF YOU NEED ASSISTANCE, PLEASE CONTACT THE OFFICE OF CONSERVATION-ENGINEERING DIVISION AT P.O. BOX 94275, BATON ROUGE, LA 70804-9275 IN WRITING WITHIN TEN (10) WORKING DAYS OF THE HEARING DATE.



THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF OFFICIAL RECORDS ON FILL AT THE OFFICE OF CONSERVATION, BATON ROUGE, LOUISIANA.

DATE Kun Mell Ottober 202 CUSTODIAN OF OFFICIAL RECORDS BUSSELL MCGRE

> STATE OF LOUISIANA OFFICE OF CONSERVATION BATON ROUGE, LOUISIANA

> > October 20, 2020

ORDER NO. 1165-K-26

Order concerning the creation of two (2) additional drilling and production units for the **Haynesville Zone**, **Reservoir A** in the **SAN MIGUEL CREEK FIELD**, Natchitoches Parish, Louisiana.

Pursuant to power delegated under the laws of the State of Louisiana, and particularly Title 30 of the Louisiana Revised Statutes of 1950, and after a public hearing held under **Docket No. 20-300** in Baton Rouge, Louisiana, on **September 22, 2020**, upon the application of **INDIGO MINERALS LLC**, following legal publication of notice and notice in accordance with the Louisiana Administrative Code Title 43 Part XIX, Subpart 17, Chapter 39 as prescribed by the Commissioner of Conservation, the following Order is issued and promulgated by the Commissioner of Conservation as being reasonably necessary to conserve the natural resources of the State, to prevent waste as defined by law, to avoid the drilling of unnecessary wells, and otherwise to carry out the provisions of the laws of this State.

DEFINITION

The Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Sabine Parish, Louisiana, was defined in Office of Conservation Order No. 1165-K, effective October 28, 2008.

FINDINGS

The Commissioner of Conservation finds as follows:

1. That Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, established rules and regulations and created drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Sabine and Natchitoches Parishes, Louisiana.

2. That the creation of two (2) additional drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Natchitoches Parish, Louisiana, is necessary to insure orderly development, to prevent waste and to avoid the drilling of unnecessary wells.

3. That the available geological, engineering or other appropriate information indicates that the units designated HA RA SU58 and HA RA SU59, as shown on the plat labeled, "Indigo - Exhibit No. 8 for Docket No. 20-300", a copy of which is attached hereto, are reasonable and should be adopted; that said units encompass the maximum area which may be efficiently and economically drained by the well or wells designated by the Commissioner of Conservation to serve said units as the unit well, substitute unit well, or alternate unit well, and that creation of said units should reasonably assure to each separate tract included therein an opportunity to recover its just and equitable share of the contents of the reservoir.

4. That the separately owned tracts, mineral leases, and other property interests within the proposed units should be force pooled and integrated with each separate tract sharing in unit production on a surface acreage basis of participation.

5. That with respect to horizontal wells drilled to the Haynesville Zone, Reservoir A, within or to serve HA RA SU58 and HA RA SU59, where the horizontal portion of the well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and any offset well(s) should be calculated based on the distance to the nearest perforation in the well and not based on the penetration point or terminus.

6. That except to the extent contrary herewith, the provisions of Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, and of all applicable Statewide Orders, should be extended to the additional units created herein.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

I. The units designated HA RA SU58 and HA RA SU59, as shown on the plat labeled, "Indigo - Exhibit No. 8 for Docket No. 20-300", a copy of which is attached hereto and made a part hereof, be and they are hereby approved and adopted as two (2) additional drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Natchitoches Parish, Louisiana

The units have not been surveyed, and when a survey plat of the units showing the exterior limits thereof, the total acreage therein, and the acreage in each separately owned tract, has been submitted to and accepted by the Commissioner of Conservation or any member of his staff, insofar as it shows the exterior limits of each unit, said plat shall be substituted for the above exhibit and made a part of this Order by reference. In the event of conflicting claims of ownership of acreage in the units, such acreage may be so identified on the survey plat. Such identification of acreage subject to conflicting claims shall not be construed as an acknowledgment of the validity of any such claims, and shall not affect any other acreage in separately owned tract in each unit.

The survey plat shall be prepared in accordance with the requirements for unit plats and survey plats adopted by the Commissioner of Conservation. It is recognized that the exterior boundary lines of the units, as surveyed, may differ from those lines as shown on the attached plat because of the requirement that by survey the geologically significant wells be correctly located with respect to each other and to the unit boundary lines that they control.

2. The separately owned tracts, mineral leases, and other property interests within the units created herein are pooled, consolidated and integrated in accordance with Section 10, Title 30 of Louisiana Revised Statutes of 1950, with each separate tract sharing in unit production in the proportion that the surface area of such tract bears to the entire surface area of said unit in which it is situated. Also, all operations on and production from the units shall be considered operations on and production from each of the separate tracts within said unit and under the terms of each of the mineral leases affecting said tracts.

3. With respect to horizontal wells drilled to the Haynesville Zone, Reservoir A, within or to serve HA RA SU58 and IIA RA SU59, where the horizontal portion of the well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and any offset well(s) shall be calculated based on the distance to the nearest perforation in the well and not based on the penetration point or terminus.

4. Except to the extent contrary herewith, the provisions of Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders; and all applicable Statewide Orders, shall remain in full force and effect and shall apply to the additional units created herein.

ORDER NO. 1165-K-26

5. When there is obtained additional geological, engineering or other appropriate information which would indicate a required change or revision of the unit boundaries as adopted herein, or which would indicate a required change or revision of other provisions of this Order, the party or parties in possession of such additional information shall petition to the Commissioner of Conservation for a public hearing for the purpose of considering appropriate changes.

This Order shall be effective on and after September 22, 2020.

OFFICE OF CONSERVATION OF THE STATE OF LOUISIANA

RICHARD P. IEYOUB COMMISSIONER OF CONSERVATION

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Indigo Exhibit No. 8 for Docket No. 20-300 Attached

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Regulatory Comparison



State of Louisiana department of natural resources office of conservation

STEPHEN CHUSTZ INTERIM SECRETARY

JAMES H. WELSH COMMISSIONER OF CONSERVATION

MEMORANDUM

November 2, 2012

TO: Office of Conservation staff

FROM: James H. Welsh, Commissioner of Conservation

SUBJECT: Horizontal cross unit lateral wells in shales, tight gas sands and unconventional reservoirs

Advances in horizontal drilling techniques for wells drilled and completed in shale formations, tight gas sands and unconventional reservoirs have advanced beyond the historical spacing scheme recognized in Statewide Order No. 29-E and commonly adopted field spacing provisions. In particular this is true with respect to extended length horizontal laterals. I am statutorily charged to prevent waste, avoid the drilling of unnecessary wells, protect correlative rights of owners within common sources of supply and to otherwise promote the full and efficient development of the natural resources of this state. In order to better carry out these statutory duties in light of the changes in technology, I find it necessary to set forth the following internal policy which will govern the application for and docketing of administrative hearings to consider horizontal cross unit lateral wells in shales, tight gas sands, and unconventional reservoirs. Prior to docketing any application for hearing staff shall review it for the following, which must be either requested or alleged and proposed to be proven at the hearing:

1. The applicant seeking permission to drill a horizontal cross unit lateral well must present at the 30-day notice hearing called for this purpose written evidence of at least the consent of the majority of owners having the right to drill (both working interest owners, and if applicable, unleased tandowners and/or unleased mineral owners) for each unit penetrated by the proposed cross-unit lateral well(s), and including the consent of the current unit operators of all units penetrated by the proposed cross-unit lateral well(s).

 That, based on the available testimony and evidence, the proposed horizontal cross unit lateral well(s) is likely to prevent waste, avoid the drilling of unnecessary wells, protect correlative rights and promote the full and efficient development of each of the affected units.

3. Unit production from each cross unit lateral well(s) will be allocated to each unit in the same proportion as the perforated length of the lateral in each unit bears to the total length of the perforated lateral as determined by an "as drilled" survey performed after the cross-unit well is drilled and completed; provided unit production shall continue to be shared on a surface acre basis. "Perforated length of lateral" shall mean and is hereby defined as the length of horizontal

Post Office Box 94275 • Baton Rouge, Louisiana 70804-9275 • 617 North 3rd Street • 9th Floor • Baton Rouge, Louisiana 70802 Phone (225) 342-5540 • Fax (225) 342-3705 • www.dnr.state.la.us/conservation An Equal Opportunity Employer

BOBBY JINDAL GOVERNOR lateral wellbore wherein perforations have been made, regardless of the number of perforated stages or individual perforations, which is measured from the lesser measured depth perforation or "top of perforations" to the greater measured depth perforation or "base of perforations."

4. Production from each cross unit lateral well shall be separated and metered individually and this information shall be reported to the Office of Conservation in a manner to be prescribed by this office.

5. With respect to each horizontal cross unit lateral well, where the horizontal portion of the well is cased and cemented back above the top of the zone of completion, the distance to any unit boundary and any offset well(s) should be calculated based on the distance to the nearest perforation in the well, and not based on the penetration point or terminus, and that the proposed cross unit laterals will be perforated no closer than 330 feet from any unit boundary of a unit other than those for which they are designated to serve.

While this internal memorandum sets forth guidance in docketing hearing applications for crossunit lateral wells in shale, tight gas sands and unconventional reservoirs, nothing herein shall limit nor be construed to limit the Commissioner of Conservation's authority to grant or deny any application in accordance with the applicable laws, rules, regulations, and orders based upon the evidence submitted at the public hearing.

Issued by:

James H. Welsh Commissioner of Conservation

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF OFFICIAL RECORDS ON FILE AT THE OFFICE OF CONSERVATION, HATON ROUCE, LOUISIANA.

EXHIBIT "F"

DATE Kund Mich October 22 CUSTODIAN OF OFFICIAL RECORDS RUSSELL MCGEE

STATE OF LOUISIANA OFFICE OF CONSERVATION BATON ROUGE, LOUISIANA

October 20, 2020

ORDER NO. 1165-K-27

Order concerning permission to drill, designate and utilize four (4) cross unit horizontal wells: one (1) well as the unit well and three (3) wells as alternate unit wells at exceptional locations for HA RA SU58 and HA RA SU59 in the SAN MIGUEL CREEK FIELD, Natchitoches Parish, Louisiana.

Pursuant to power delegated under the laws of the State of Louisiana, and particularly Title 30 of the Louisiana Revised Statutes of 1950, and after a public hearing held under Docket No. 20-300 in Baton Rouge, Louisiana, on September 22, 2020, upon the application of INDIGO MINERALS LLC, following legal publication of notice and notice in accordance with the Louisiana Administrative Code Title 43 Part XIX, Subpart 17, Chapter 39 as prescribed by the Commissioner of Conservation, the following Order is issued and promulgated by the Commissioner of Conservation as being reasonably necessary to conserve the natural resources of the State, to prevent waste as defined by law, to avoid the drilling of unnecessary wells, and otherwise to carry out the provisions of the laws of this State.

DEFINITION

The Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Sabine Parish, Louisiana, was defined in Office of Conservation Order No. 1165-K, effective October 28, 2008.

For purposes outlined in the Order promulgated herewith, "perforated length of lateral" shall mean and is hereby defined as, the length of horizontal lateral wellbore wherein perforations have been made, regardless of the number of perforated stages or individual perforations, which is measured from the lesser measured depth perforation or "top of perforations" to the greater measured depth perforations".

FINDINGS

The Commissioner of Conservation finds as follows:

1. That Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, established rules and regulations and created drilling and production units for the exploration for and production of gas and condensate from the Haynesville Zone, Reservoir A, in the San Miguel Creek Field, Sabine and Natchitoches Parishes, Louisiana, including the units designated HA RA SU58 and HA RA SU59.

2. That the available geological, engineering or other appropriate information indicates that it would be reasonable and in the interest of conservation to permit the applicant to drill, designate and utilize four (4) cross unit horizontal wells: one (1) cross unit horizontal well as the unit well and three (3) cross unit horizontal wells as alternate unit wells for HA RA SU58 and HA RA SU59, at the locations and in the general manner shown on the plat labeled, "Indigo - Exhibit No. 8 for Docket No. 20-300", a copy of which is attached hereto, or with respect to the unit well, at any other legal location within the respective units, in exception to the spacing

ORDER NO. 1165-K-27

provisions of the 1165-K Series of Office of Conservation Orders, provided that no portion of the perforated length of lateral in the cross unit wells should be located closer than 330 feet to any unit boundary except for the common unit boundary between said units.

3. That the cross unit horizontal wells to be drilled for HA RA SU58 and HA RA SU59, at the locations designated in accordance with Finding No. 2 above, are necessary and in the interest of conservation and will efficiently and economically drain a portion of the Haynesville Zone, Reservoir A, underlying HA RA SU58 and HA RA SU59, which cannot be efficiently and economically drained by any existing well within such units, including portions of the participating units that are contained within 330 feet of either side of the common unit boundary between said units.

4. That with respect to horizontal wells drilled to the Haynesville Zone, Reservoir A, within or to serve HA RA SU58 and HA RA SU59, where the horizontal portion of the well is cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and any offset well(s) should be calculated based on the distance to the nearest perforation in the well and not based on the penetration point or terminus.

5. That unit production from said cross unit horizontal wells should be allocated to each unit in the same proportion as the perforated length of the lateral, as defined in the DEFINITIONS section herein, in that each unit bears to the total length of the perforated lateral, as determined by an "as drilled" survey performed after the cross unit wells are drilled and completed; and that unit production should continue to be shared on a surface acreage basis.

 That the operator of HA RA SU58 and HA RA SU59 should be allowed to produce the unit allowable for each of said units from either the respective unit wells, any alternate unit well, or from any combination thereof, at the discretion of the operator.

 That production from the proposed cross unit horizontal wells should be separated and metered individually and this information should be reported to the Office of Conservation in a manner to be prescribed by the Commissioner of Conservation.

8. That the owners of a majority of working interests in, and the operator(s) of HA RA SU58 and HA RA SU59 have indicated that they are in agreement with the cross unit horizontal wells proposed to be adopted herein, and that the applicant has received no objections to said proposal.

ORDER

NOW, THEREFORE, IT IS ORDERED THAT:

1. In order to efficiently and economically drain a portion of the Haynesville Zone, Reservoir A, underlying HA RA SU58 and HA RA SU59 in the San Miguel Creek Field, including portions of the participating units that are located within 330 feet of either side of the common unit boundary between said units, the applicant. Indigo Minerals LLC, is hereby authorized to drill, designate and utilize four (4) cross unit horizontal wells: one (1) cross unit horizontal well as the unit well and three (3) cross unit horizontal wells as alternate unit wells for HA RA SU58 and HA RA SU59, at the locations and in the general manner shown on the plat labeled, "Indigo - Exhibit No. 8 for Docket No. 20-300", a copy of which is attached hereto and made a part hereof, or with respect to the unit well, at any other legal location within the respective units, in exception to the spacing provisions of 1165-K Series of Office of Conservation Orders, provided that no portion of the perforated length of lateral in the cross unit wells shall be located closer than 330 feet to any unit boundary except for the common unit boundary between said units.

2. With respect to horizontal wells drilled to the Haynesville Zone, Reservoir A, within or to serve HA RA SU58 and HA RA SU59, where the horizontal portion of the wells are cased and cemented back above the top of the Haynesville Zone, Reservoir A, the distance to any unit boundary and any offset well(s) shall be calculated based on the distance to the nearest perforation in the well and not based on the penetration point or terminus.

 Unit production from said cross unit horizontal wells in HA RA SU58 and HA RA SU59 shall be allocated to each unit in accordance with Finding No. 5 hereof.

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4. The operator of HA RA SU58 and HA RA SU59 is hereby authorized to produce the unit allowable for both units in accordance with Finding No. 6 hereof.

5. Production from the proposed cross unit horizontal wells shall be separated and metered individually and this information shall be reported to the Office of Conservation in accordance with Finding No. 7 hereof.

6. Except to the extent contrary herewith, the provisions of Office of Conservation Order No. 1165-K, effective October 28, 2008, as amended and supplemented by the 1165-K Series of Orders, and all applicable Statewide Orders, shall remain in full force and effect.

This Order shall be effective on and after September 22, 2020.

OFFICE OF CONSERVATION OF THE STATE OF LOUISIANA

RICHARD P. IEYO

COMMISSIONER OF CONSERVATION

JVH Noth

Indigo Exhibit No. 8 for Docket No. 20-300 Attached

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Regulatory Comparison

Basics of Texas Oil and Gas Regulation: Drilling, Completing, and Producing Wells

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I. INTRODUCTION¹

The Railroad Commission of Texas ("RRC") is the Texas agency that regulates its oil and gas industry. It is the oldest regulatory agency in Texas and is presided over by three commissioners, who are elected to staggered six-year terms in statewide elections. It does not regulate railroads.² The Railroad Commission regulates from a broad statutory foundation, described generally below. Its core responsibilities are to prevent the waste of recoverable hydrocarbons, to protect correlative rights (i.e. prevent confiscation of one's fair share of hydrocarbons), and to prevent and address oil and gas pollution. In so doing, it does not directly adjudicate questions of title to oil and gas interests; it does not have the power to unitize, other than in specific and rarely-used instances.³ Instead, the Commission adopts fairly broad statewide rules, and then a web of much more specific field rules for individual fields, which provide the ground rules for drilling units and production units (called proration units). Generally, floors and ceilings exist as to the minimum numbers of acres needed to drill, and the maximum numbers of acres that may be contributed to proration units. Private agreements, typically oil gas leases and

¹ This is an update of several papers the authors have presented at recent Texas CLE presentations.

 $^{^2}$ Periodically a political push is made to rename the agency. The author expresses no opinion as to whether the Railroad Commission should be renamed. People have unexpectedly strong opinions on the matter.

³ Normally, this would be for secondary or tertiary recovery, or under the sometimes mystifying provisions of the Mineral Interest Pooling Act, Chapter 102 of the Texas Natural Resources Code. The MIPA is worthy of its own paper altogether and will not be discussed at length herein. Just know that it exists, and sometimes it will allow for an application for forced pooling in Texas, which would be adjudicated at the Railroad Commission.

declarations of pooled units, dictate the implications of these choices, normally how much leased acreage may be retained by a single producing well, and how much then must be released for potential subsequent development.

This coupling of regulatory and contractual concepts is not always a smooth one. Justice Pope identified the problem succinctly in the seminal case of *Jones v. Killingsworth* in 1965, writing in his dissent, "[t]he fault that I find with our holding in this case is that we are trying to fit the meaning of terms used by private parties to a lease into a supposed technical terminology used by the Railroad Commission in making its rules and orders."⁴ Justice Boyd, more than fifty years later, showed us how far we have not come: "the inclusion of such regulatory principles in a retained-acreage clause may also cause confusion or disappointment, as the contracting parties may not fully understand the ramifications of including a regulatory term in the typical mineral lease."⁵

But these issues are side-effects of a flexible regulatory scheme that has been profoundly successful over time. By allowing operators and their scientists the opportunity to help dictate the specific rules for regulation (largely via the field rules process), the Commission has allowed Texas to become the nation's largest producer of oil and gas, while protecting its reservoirs from over-production and honoring the correlative rights of smaller participants.

II. DRILLING ''UNITS'' AT THE TEXAS RAILROAD COMMISSION

A. How Did We Get Here

In Texas, oil and gas in place is real property and the landowner is the absolute owner of the oil and gas in place.⁶ The most common avenue for developing oil and gas reserves is to lease

⁴ Jones v. Killingsworth, 403 S.W.2d 325, 333 (Tex. 1965) (Pope, dissenting).

⁵ Endeavor Energy Resources, L.P., et al. v. Discovery Operating, Inc., et al., 554 S.W.3d 586, 599 (Tex. 2018).

⁶ Texas Co. v. Daugherty, 160 S.W. 129 (Tex. Civ. App.—Fort Worth 1913).

property to an oil and gas company. A lease granting the right to develop oil and gas is a determinable fee.⁷ When oil and gas is produced, it becomes personal property. If oil and gas move to another tract and is produced from a well on another's land, that person has no liability to the owner of the tract under which the oil or gas originated. This is the rule of capture. It is across Texas, these property concepts encouraged chaotic, unrestrained drilling in every area of the state.

In 1917, alarmed by the development frenzy, Texas amended its Constitution to include the declaration that the conservation and development of natural resources was a public right and duty, and the Legislature was authorized to adopt laws to ensure such conservation.⁸ Very public concern about fire and threats to surface waters from the large earthen pits in which crude was then stored, prompted the Texas Legislature to adopt extensive provisions relating to prevention of waste in 1919. The Texas Railroad Commission was designated as the state agency charged with application of regulating the oil and gas industry. Movement of crude on railroads, the primary access to markets, was thus already within its ambit. Since movement to market was directly tied to prevention of physical waste, the Commission's existing authority over the transporters of hydrocarbons made them the logical choice to regulate oil and gas operations also.⁹

Between 1917 and 1934, the Texas Legislature adopted the majority of the statutes that have governed Commission regulation of the oil and gas industry since then.¹⁰ The Commission began to promulgate reservoir specific rules applicable to drilling, completing and producing oil and gas wells. These initial rules were adopted based on data from operations in early reservoirs, often requested and supported by the operators in the area. These orders were bundled together in

⁸Vernon Ann. Texas Const., Art. XVI, §59 (2000).

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⁷ Stephens Cty. v. Mid-Kansas Oil & Gas Co., 254 S.W. 290 (Tex. 1923).

⁹Now at Tex. Nat. Res. Code Ann. §81.051 (Vernon 2020).

¹⁰See generally Texas Natural Resources Code, Title 3, Chapters 81 through 123, especially Chapters 81, 85 and 86.

pamphlets called circulars which were updated and expanded. In 1919, the Commission adopted its first "statewide" rule by order. This was its general well spacing rule, now known as Rule 37.

This practice of regulating based on actual development experience and fact specific information, sometimes applicable only in one area, and sometimes applicable statewide, was an extraordinary approach to the regulatory process. It is what underpins the resilience, adaptability and responsiveness of the Commission's regulation over the past 100 years and is the key to its unique success as a regulator. There are now 105 statewide rules applicable to oil and gas operations in Texas.¹¹ There are over 40,000 pages of special field rule orders applicable to individual reservoirs.¹² In addition, hundreds of thousands of wells have individual well-specific compliance criteria.

The shale and horizontal well boom of the past two decades has followed this same regulatory path. Over the past 20 years, operators have specifically sought and obtained special field rules that allowed for exceptions to completion requirements for horizontal wells. Based on industry experience in what are now identified as unconventional reservoirs, the Commission has adopted modifications to statewide rules designed for vertical wells in traditional reservoirs to make them applicable to horizontal wells in unconventional fracture treated fields (a "UFT" field). A UFT field is defined as a field with a permeability of 0.1 millidarcies or less, in which horizontal drilling and hydraulic fracture stimulation are necessary to recover oil or gas. Generally speaking, the Wolfcamp shale plays in West Texas in the Delaware and Midland Basins, the Eagleford Shale in South Texas and the Barnett Shale in north Central Texas are the most widely recognized of the UFT fields. In 2018, the Commission formally recognized 58 fields as UFT fields in Docket

 ¹¹ The Commission's oil and gas regulations can be found in Title 16, Chapter 3 of the Texas Administrative Code. The correct citation form is 16 Tex. Admin. Code 3.**, but for ease I will simply refer to them as Statewide Rule **.
¹² Special field rules are adopted by Commission order, after a hearing and are referenced by a unique docket number. They can be found on the Commission's website, which is http://www.rrc.state.tx.us.

No.01-0299858 (Order issued April 12, 2016) and the rules provide for addition to this list if requisite criteria is met. Identification as a UFT field will allow for application of modified spacing rules, completion rules and provisions relating to assignment of proration units.

B. The Application to Drill

Wells drilled today, especially in any of the shale plays, will be drilled under a combination of statewide rules and special field rules. The form to apply for a drilling permit is called a Form W-1. The most important data inputs on a Form W-1 are the minimum distances from the proposed wellbore to any Commission-recognized boundary line or between wells on the same lease or developmental unit to be drilled and completed in the same Commission-recognized field, (Rule 37 "Statewide Spacing Rule") and also the acreage to be associated with the proposed well (Rule 38 "Well Densities" and Rule 40 "Assignment of Acreage to Pooled Development and Proration Units"). Rule 37, the spacing rule, tells an operator where it can put a well. Rule 38, the density rule tells the operator how many wells can be on its property to prevent waste and protect its opportunity to produce its fair share of the recoverable oil and gas.

An operator must look at all of the potentially applicable rule language to ensure the proposed wellbore location and the acreage associated with it for regulatory purposes comply with the Commission's regulations. If an operator fails to do so, or is careless, it risks holding a permit that is invalid, drilling a well for which it has no valid authority and producing oil and gas from an unauthorized well. The well can be shut in and the operator can be liable for illegal production.¹³

To file any permit or obtain authority for activity subject to Commission regulation, a person or entity must be recognized as an "operator" by the Commission. This requires the filing of a Form P-5, which is the organization report identifying the pertinent information (name,

¹³ See Statewide Rules 5, 37, 38 and 86.

officers, address, registered agent) for a person or entity that seeks to conduct activities relating to the oil and gas industry in Texas. To obtain a P-5 number and be identified as an operator, the commission also requires proof of financial responsibility (bond, cash or letter of credit).

The rule that requires an operator to file an application for a drilling permit to drill a well is Statewide Rule 5, "Application to Drill, Deepen Re-Enter or Plug Back" which requires an operator file an application to drill subject to Rules 37, 38 and 40, along with "any relevant information required or requested by commission representative to determine compliance." The rule further provides that operations "shall not be commenced until the permit has been granted and the waiting period has terminated." Statewide Rules 37, 38 and 86 also state that operations cannot commence without an approved drilling permit.¹⁴ Please note this admonition about drilling without a permit becomes very important to consider when, as is often the case, an operator is preparing its application to drill as the rig is coming down the lease road.

Rule 37 provides that in the absence of special field rules, a well cannot be drilled closer to an external boundary line (lease, pooled unit, unitized area or PSA unit perimeter) than 467' or within 1200' of another well on the same lease or unit, where the wells will be drilled and completed in the same Railroad Commission-recognized field. Rule 11(a) prohibits a well from crossing a lease line without special permission. The purpose of a spacing rule is to provide for efficient recovery of hydrocarbons from a reservoir while protecting the correlative rights of owners in that reservoir. Rule 86 tracks many of the same provisions as Rule 37, for development of horizontal wells. Special field rules can, and often do, vary the distances of the statewide rules

¹⁴ If the proposed target field is identified as a field which contains hydrogen sulfide as a constituent component of the produced fluid (gas or liquid) drilling operations will be subject to the application of the reporting and safeguard provision of Rule 32, which is the Commission rule relating to operations involving H2S. At a minimum, obligations will include reporting, warning and marker requirements. Depending on the H2S concentration and exposure radius, additional and more stringent requirements may be required at the drillsite during drilling and completion. See 16 TAC 3.36.

to reflect reservoir specific factors that make a lease line offset other than 467' more appropriate to prevent waste, protect correlative rights or otherwise ensure the effective and efficient development of a particular geologic and geographic area. Where an operator encounters circumstances that require a location that does not comply with the statewide rule, or where applicable the special field rule, the operator may ask for an exception to the applicable spacing rule for a particular well and location.

For horizontal wells, Rule 86 and applicable special field rules provide for multiple kinds of spacing considerations. Lease line spacing applies to all take points along a lateral that could be or are less than the minimum specific distance to a boundary line. Because the majority of the fields in which horizontal wells are drilled are unconventional shales or fractured carbonates, the Commission has chosen to regulate spacing of horizontal laterals by measuring to the lease line in a perpendicular direction from the lateral for the length of the lateral, but a shorter distance from the toe and heel of a well, or the first and last take points. Often that can be as little as 100' from a lease line. This is because industry experience developing shales and fractured carbonates with horizontal wells has demonstrated that drainage occurs perpendicular to the lateral along the natural or man-made fractures, making it less likely that the first or last take points will drain adjacent properties. Most fields in which horizontal wells are drilled have also dispensed with any between well spacing limitation.

Rule 86 and most special field rules provide for a de facto exception to the prohibition against drilling across lease lines in Rule 11(a) for all take points and also for off lease surface and penetration points for a lateral. In addition, there is a tolerance provision called the "box rule" for an as-drilled well. The box rule recognizes the technical difficulty in drilling a perfectly straight wellbore by giving operators tolerance for some deviation for "as drilled" locations. The rule states:

A properly permitted horizontal drainhole will be considered to be in compliance with the spacing rule set forth herein if the as-drilled location falls within a rectangle established as follows:

- a. Two sides of the rectangle are parallel to the permitted drainhole and 50' on either side of the drainhole;
- b. The other two sides of the rectangle are perpendicular to the sides described in (a) above, with one of those sides passing through the first take point and the other side passing through the last take point.

Any take points on a lateral that fall outside the tolerance box are non-compliant and will require an amended permit seeking an exception to the spacing rule for any and all portions that are irregular.

Industry experience has also shown that more take points within the target interval will recover more reserves and prevent physical waste. To provide for the longest active lateral on a lease or unit, operators often start the vertical portion of a well on the surface of adjacent land so they can curve into the lateral at a regular location in the actual target zone once they reach their own property. The top of a Commission designated interval is usually a recognized geologic marker in the area. It is seldom the actual target interval. If the operator does not encounter the top of the designated interval for the field until they are on their property, the Commission will accept the permit without further action. The Commission presumes the operator has authority from the appropriate parties to support locating the vertical portion of the well on adjacent lands. If the operator penetrates the top of the designated interval while still on the adjacent property, he will be required to provide notice to the offset operator, lessees or unleased mineral interest owners. The holding in *Lightning Oil Co. v. Anadarko E & P Onshore, L.P.*,¹⁵ does not modify

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¹⁵ 520 S.W.3d 39 (Tex. 2017).

this regulatory obligation. The Commission will consider a protest to the permit, but the complaining party bears the burden to show harm.

Rule 38 sets out the minimum acreage necessary to drill a well as a standard drilling unit. Again, Rule 86 contains much of the same language as Rule 38, but applicable to horizontal wells. An operator must have a good faith claim to at least the amount of acreage identified as the standard drilling unit for a field in order to obtain a valid drilling permit. The statewide density provision for fields under the statewide 467/1200 spacing is 40 acres. This means that in fields that have no special field rules, the basic drilling unit for both oil and gas wells is 40 acres. As with Rule 37, special field rules can, and often do, vary this basic unit to reflect reservoir specific parameters and well-specific exceptions are also common.

In traditional oil or gas reservoirs that are common sources of supply, with wells in pressure communication, determinations about appropriate density revolve(d) around the effective and efficient drainage areas of wells in the reservoir. All other things being equal, a field developed to final density would have produced all of the recoverable hydrocarbons in a reservoir, and everyone would have gotten their share of the pie. As traditional reservoirs were depleted and operators looked for new reserve sources, multi-lenticular plays like the Cotton Valley caused the Commission to adopt special field rules that would allow for flexibility in both spacing and density, rather than thousands of well-by-well exceptions to Rule 37 and 38. Optional field rules give operators the opportunity to encounter localized accumulations of oil and/or gas that were found within the larger target formation. This same flexibility has been applied in unconventional reservoirs where horizontal wells are drilled and has resulted in the authorization of acreage assignment to horizontal well units that increases with lateral length in Rule 86 and most applicable special field rule orders. For wells in UFT designated fields, density will be considered for each

discrete owner's distinct portion of the depth severed geographic area. That is, if operator A owns the rights to develop the Bone Spring in Section 11 and Operator B owns the right to develop the Wolfcamp in Section 11, the Commission will apply the density rule to each of them independently.

Determining whether a density exception is necessary is a math issue. For a first well, does the acreage the operator identifies as the lease, pooled unit, production sharing unit or allocation well unit equal or exceed the standard density acreage in the applicable statewide rule or special field rule. For subsequent wells on the same acreage, an operator must divide the unit or lease acreage by the number of wells completed and/or permitted within the lease or unit. If it exceeds the standard unit per well, no exception is needed. If the standard density is exceeded, the operator may choose to shut in an existing well and affirm that it will not produce both wells concurrently, or it may seek an exception to drill the well on substandard acreage. The operator is obligated to provide notice to operators and unleased mineral interest owners of offsetting tracts adjacent to the lease or unit and tracts less than the minimum spacing distance from the proposed well.

C. Issues Arising from Permitting Wells That Cross Multiple Tracts.

The acreage needed to drill a well as a regular well for density purposes is often, but not always, also the same acreage size identified as the metric for a proration unit (prorations units are discussed at some length below). Rules 39, 40 and 86 outline the requirements for assignment of acreage for proration purposes, where acreage is a factor in proration. For purely regulatory purposes, having options for assignment of acreage that take into account lateral length allows for the practical effect of sufficient acreage around a wellbore to provide room to drill and develop the play effectively and efficiently. Assigning more acreage for proration purposes also allows for the largest drainage area to be considered when allocating allowable production volumes, especially with initial flush production in significant volumes, which is common in most horizontal plays. When an operator is permitting, drilling and completing a well, it should assign the maximum acreage possible to ensure that the well will recover the maximum amount of hydrocarbons that are accessible to it for recovery. The potential limitation on assignment of acreage by the Commission is lateral length. That is, however, not the real issue.

The real issue, when an operator is about to prepare an application to drill and identifying the acreage to be associated with a proposed well is what that operator is authorized to assign by the leases, contracts or other instruments that give it the right to drill the well in the first place. This is why you, yes, you, the lawyer or landman, need to know about drilling permits and participate in the preparation and filing of the applications. Only a lawyer or a landman has access to the data to determine whether an operator has the right to assign acreage for proration purposes and consider how that assignment affects future operations under the applicable title documents.

A drilling permit application will identify the acreage to be developed on which the proposed well is located. From and after the granting of the permit, the Commission will consider the *regulatory* lease for all Commission compliance purposes to be the geographic perimeter of the acreage identified on the Form W-1. When an operator identifies that acreage, it can be a single lease, a pooled unit made up of multiple tracts and leases, a production sharing agreement made up of multiple tracts, which can be leases and pooled units, or it can be an "allocation" well. Any horizontal well that crosses more than one tract is technically an allocation well, as production from the well is allocated to the tracts and interest owners on some basis for payment of royalties. For permitting purposes at the Commission, the term "allocation well" is a specific term of art. It applies to a well for which the operator is asserting a right to drill across and through multiple tracts based solely on his leases, as a series of lease wells strung together.

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Boundaries for a pooled unit will be set by the perimeter of the tracts pooled together under lease pooling clauses and identified on the Form P-12. The wellbore does not have to traverse or penetrate a tract for a tract to be included in the pooled unit acreage. By filing the P-12, the operator is stating that he has the authority to pool as shown on the form and accompanying plat. Please note, the operator is affirming that he has the authority as of the date the P-12 is filed, not that he will have or might have or expects to have, authority. A Form P-16 will affirm that an operator has a good faith claim to authority to pool multiple tracts as shown on the P-12. The Form P-16 is also where an operator affirms that it has authority to develop separate tracts together by contract (Production Sharing Agreement) or under a claim of right pursuant to leasehold (an allocation well unit). Boundaries for a Production Sharing Agreement well will be the perimeter of all tracts in which at least 65 percent of the working and royalty interest have executed the Production Sharing Agreement. Again, the tracts can be included in the unit acreage even if the wellbore does not penetrate them. The boundary for an allocation well is the perimeter of the tracts under lease which are actually penetrated by the wellbore. When preparing or reviewing these forms as part of the drilling application package, the operator must ensure that the form is correctly describing the field or target interval the operator is authorized to develop and the acreage identified as the unit to be developed is authorized to be associated with that proposed wellbore.

The Commission does not require that an operator demonstrate that it has authority to commit 100% of the undivided interest in each tract for pooled units, PSAs or allocation wells, but an operator must have some authority to traverse each drillsite tract. To the extent the operator seeks to include tract acreage in the unit for a well for density or proration purposes, it may only include acreage in which it has a good faith claim to title of some kind. This is seldom an issue for a vertical well but arises regularly for horizontal wells. This analysis is always time and

location specific. There is no template an operator can leave in a file. The analysis may appear simple (no limit on authority to pool) but end up complicated and subject to change. Staff should never just copy forms from an earlier well in the file. Leases may expire, acreage may be released or assigned. Production Sharing Agreements are usually very specific. Sometimes pooling authority is limited. For example, the General Land Office does not authorize any pooling in its leases. Each request to pool a GLO lease must be independently approved, and approved pooled units can be temporary, rather than permanent. Pooled units or production sharing agreements may also be limited by depth or field, size or even well classification. Time and circumstances may also change the analysis. There may be an area that an operator considers a gas play. A pooled unit or a production sharing agreement unit is formed for gas wells. Commission forms are filed and permits granted for the first three wells on the unit. All three are gas wells. A fourth well is permitted as a gas well but completed as an oil well. The pooling agreement or PSA, as well as underlying leases, must be reviewed to determine if a different set of criteria or even a new agreement must be entered into to properly authorize the permit for the fourth well.

The second area where care must be taken is in the identification and notation of those tracts in which there are unleased and/or non-participating undivided interests. This applies to pooled units and units created by contract, more commonly identified as Production Sharing Agreements or PSAs. It is critical that every tract in which there is at least one unleased and/or non-pooled undivided interest be correctly identified as such when a drilling permit application is filed. The Commission uses this information to determine whether the application to drill will require an exception to the spacing rule for an interior tract line that qualifies as a Rule 37 boundary.

In order to obtain a regular (non-exception) drilling permit, an operator must drill and remain on the tract in which the unleased and/or non-participating interest exists or the well drilled on a pooled unit must remain at least the minimum spacing distance from each tract in which there is an unleased and/or non-participating undivided interest. Drilling only on the tract with the non-pooled and/or unleased mineral interest is virtually impossible when drilling a horizontal well. Some portion of the lateral is bound to cross a tract boundary, and that portion of the lateral immediately adjacent to the tract boundary will require an exception to the applicable spacing rule. Identifying each tract within a pooled unit or a PSA with unleased and/or non-participating mineral interests before the permit is filed is critical to identifying the location for a vertical well or the path of a horizontal lateral so that if possible, the permit can be filed as a regular permit.

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If, for geologic or engineering reasons, the well cannot be drilled at a location that meets the minimum spacing requirement from one or more tracts in which there is an unleased and/or non-participating undivided interest, the well will require an exception to Rule 37 before it can obtain a valid permit to drill. If an operator fails to identify a tract with an unleased and/or non-participating interest and later discovers the error or new information, the drilling permit application paperwork must be corrected. If the corrected form results in the identification of the wellbore as an exception location because it is located less than the minimum spacing distance from the tract with the unleased and/or non-participating undivided mineral interest, the operator will be required to obtain a Rule 37 exception after the fact. This is not always an easy application to obtain. If the application at issue is necessary to prevent waste or protect correlative rights and that may not be possible. If the operator is unable to prove that the well is legally entitled to a Rule 37 exception, the well will be shut in.

To determine whether an operator must seek an exception to the spacing rule to drill a proposed well location, the operator must measure from the wellbore to the nearest lease line, as well as to any tract where there are differing interests on either side of a property line. For permitting purposes, a property line exists at the line surrounding a unit of land in which the owners of working interests and their respective interests are the same throughout the entire unit outside of which at least one of the owners or their respective interests are different.¹⁶

Notice must be given to all affected parties, including, but not limited to, unleased mineral interests owners, lessees or operators of record in tracts that are closer than the minimum lease line distance or half the between well spacing, whichever is greater. Under Rule 86(h)(3) the relevant distance for horizontal wells is limited to those tracts that are less than the minimum distance to the lease line. For density exceptions, affected persons entitled to notice include the same interest owners as for Rule 37, for all tracts adjacent to the tract for which the density exception is sought, and all tracts nearer than the minimum distance to the lease line. If the operator is the only lessee or operator on the adjacent tract, he may obtain an exception by waiving objection to the exception location on behalf of the interests in the adjacent tract. This removes the regulatory bar to the permit but does not excuse the operator from any obligations to his adjacent lessor for drainage or the implied duty to protect that leasehold. The identification of persons that are "affected" in Rules 37 and 38 is a rebuttable presumption. An operator can submit geologic or engineering data to show that a party that would otherwise be entitled to notice is factually unaffected by an application

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¹⁶ See Smith & Weaver, *Texas Law of Oil and Gas*, 2d Ed., V. 2, 9.4[E]; Snell, George A., "Unleased Minerals in Your Unit," at page 11, 42d Annual HAPL Technical Workshop, April 28, 2011; Whitworth, H. Philip, and McGinnis, D. Davin, "Square Pegs, Round Holes: The Application and Evolution of Traditional and Regulatory Concepts for Horizontal Wells" 7 Tex. J. Oil, Gas & Energy L. 179, 189-90 (2011-2012)

and therefore no notice is required. The Commission also provides for notice by publication, in the event parties cannot be identified after diligent search is made.

If there is a pooled unit well, a production sharing agreement well or an allocation well, the operator must determine if there are any interest owners who are not participating in production from the proposed well, and then whether they own interests in a tract which is less than the minimum spacing distance requirement. If there are interest owners who meet that criteria, the operator needs a Rule 37 exception for his permit. This is referred to as a window tract Rule 37. Note some Joint Operating Agreements and some lease and production sharing agreements require notice of exception requests at all times even when they are participating. Although this is really a contractual issue, an argument can be made that the operator cannot make a good faith claim to speak for such parties without providing the contractually required notice, making the permit voidable.

The Commission and the Texas courts take notice requirements seriously. The Texas Supreme Court has expressly held that due process attaches to the property rights that arise from a mineral estate. *R.R. Comm'n v. Torch Operating Co.*,¹⁷ and the Commission may not deprive such interest owners of that property right in the absence of due process¹⁸ This basic constitutional premise must be honored because if legally sufficient notice of the application is not given to all persons entitled to notice, the Commission lacks jurisdiction to grant the permits in the first place.¹⁹

Even where equity might dictate less harsh results, the Commission stays its course, and insists that the due process provisions of its rules are enforced. *Anadarko E & P Company, LP v.*

¹⁷ 912 S.W.2d 790,792 (Tex. 1995).

¹⁸ Torch, supra; R.R. Comm'n v. Graford Oil Corp., 557 S.W.2d 946, 957 (Tex. 1977).

¹⁹ Turman Oil Co. v. Roberts, 96 S.W.2d 724, 726 (Tex.Civ.App.—Austin 1936 writ ref'd); Kerrville Bus Co. v. Cont'l Bus Sys., 208 S.W.2d 586, 589 (Tex.Civ. App.—Austin 1947, write ref'd n.r.e.).

Railroad Commission of Texas.²⁰ In the Long Trusts case, AEP's predecessor in interest, UPRC, applied to the Commission to obtain a drilling permit for a well that required a Rule 37 exception for its location. UPRC provided notice to the offset parties, but mistakenly gave notice to Sonat, rather than the Long Trusts, for a tract adjacent to the proposed location. The record reflected the fact that the Long Trusts participated in the drilling of the exception location well as a working interest owner, paid its share of costs after review of the AFE and took its share of proceeds from production. Five years after the well permit was issued, the Long Trusts filed a complaint with the Commission asserting that the original permit for the well was *void ab initio* because the Long Trusts had failed to receive notice of the permit application in accordance with Commission rules. Although the Commission and the Court of Appeals agreed with AEP that the Long Trusts had actual notice of the well's location, the Court upheld the Commission's conclusion that actual notice did not satisfy the requirements of Rule 37 or cure the notice defect, stating, "the Commission was entitled to insist upon strict compliance with its rule. ("An operator's rights must be acquired in compliance with the provisions of a valid rule of the Commission and none can be acquired in violation of it.")."²¹ The Court of Appeals concluded that in the absence of proper notice, the Commission "did not err in declaring the original permit void -i.e. the production was illegal from its inception – rather than voidable."²² The key takeaway here: make sure the operator performs a credible effort to identify potential tracts that may give rise to the need for an exception permit and that the operator prepares a reliable service list of potentially affected parties. A safe rule of thumb is to ask for notice by publication with any service list that exceeds twenty parties as there will almost always be a bad address despite good title work.

²⁰ not reported in S.W.3d, 2009 WL 47112, Tex. App – Austin, January 7, 2009, (No. 03-04-00027-CV) (the "Long Trusts case").

²¹ *AEP* at p. 9

²² AEP at p. 8.

If an exception to Rule 37 or 38 is required, the Commission will issue a Notice of Application, which identifies the proposed well location and offers potentially affected parties the opportunity to object and seek an opportunity for a hearing. If no party protests, the permit will be granted administratively. Once issued, drilling permits are valid for two years.

D. Obtaining an exception permit after protest.

Rule 37 prohibits the drilling of any well location that does not conform to the applicable spacing pattern unless the operator obtains an exception permit for the proposed well location. Rule 38 prohibits the drilling of any well that does not meet the minimum density requirements. There is no gray area here. As the Texas Supreme Court has noted "[t]he intention of the Railroad Commission in the adoption of Rule 37 was to outlaw operation and production of all wells drilled in violation of the permit and spacing requirements and to require the plugging of all wells so drilled.²³

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When an application is protested, the Railroad Commission will conducted an administrative hearing before its Hearings Division. At hearing, the applicant must establish that the exception location is necessary to prevent waste and/or protect correlative rights to obtain a valid permit to drill. There are two bases for Commission authority to grant exceptions to the spacing and/ or density provisions established for a field: a well at the proposed location is necessary to protect the applicant's vested property right from confiscation resulting from the application of the Commission's rules.²⁴ The applicant bears the burden of proof.²⁵ In order to prove that a well at

²³ State v. Harrington, 407 S.W.2d 467, 475 (Tex. 1966).

²⁴ Rule 37(a)(1); *R.R. Comm'n of Texas v. Shell Oil Co.*, 139 Tex. 66, 161 S.W.2d 1022 (1942); *Wrather v. Humble Oil & Ref. Co.*, 147 Tex. 144, 214 S.W.2d 112 (1948); *Railroad Commission of Texas v. Williams*, 163 Tex. 370, 356 S.W.2d 131 (1961).

²⁵ Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W.2d 73 (1939).

the proposed location is necessary to prevent waste, the applicant is required to establish that as a result of unusual subsurface conditions peculiar to the area in which the well is proposed to be located, the proposed well will recover a substantial amount of hydrocarbons that would otherwise go unrecovered by any well at a regular location.²⁶ Please note that if any other operator can recover the hydrocarbons, it is not waste. In order to establish the right to an exception to prevent confiscation, an applicant must demonstrate that, *absent the applied for well*, the applicant would be denied a reasonable opportunity to recover its fair share of the hydrocarbons in the reservoir.²⁷

All operators are obligated to try and recover their fair share from regular locations, if possible, and where impossible to move to locations that may require spacing or density exceptions. That is what makes an exception location *necessary*, as opposed to merely handy or more profitable. The possibility of confiscation as a matter of law can only arise where an applicant possesses a vested right to recover oil and gas (a right that is correlative with the vested rights of the other interest owners in the field) that is entitled to protection, and the application of the Commission's spacing rules threatens to confiscate that right by depriving the applicant of a fair chance to recover the oil and gas beneath his property. The right to an exception based on confiscation can only be granted where *the Commission spacing rules* prevent recovery of hydrocarbons. Moreover, the right to seek an exception is an opportunity, not a guarantee. It is well recognized that

[o]ne of the things that the Commission must do to conserve oil and gas is to see that oil and gas fields are drilled in an orderly and scientific manner. In order to accomplish orderly drilling, the Commission has simply promulgated a rule fixing minimum spacing distances at which wells may be drilled without application, notice or hearing. Anyone desiring to drill a well at a lesser distance must secure a special permit, after notice and hearing. Such applicant assumes the burden of proof that such well is necessary to prevent waste or to prevent the confiscation of

²⁶ See Wrather, supra.

²⁷ See Gulf Land Co., supra.

property....The right to be protected against 'confiscation' under Commission oil and gas rules is not absolutely unconditional or unlimited.²⁸

E. Statewide Rules About Completion

Rule 13 sets out the casing and cementing requirements for completion of oil and gas wells. The intent of the rule is to ensure that casing is securely anchored in the hole in order to effectively control the well at all times, all useable quality water zones are isolated and sealed off to prevent contamination or harm, and that all productive zones, potential flow zones and zones with corrosive formation fluids be isolated and sealed off to prevent vertical migration of fluids, including gases, behind the casing. Exceptions to the provisions of Rule 13 can and do occur. They are handled primarily by the Commission's district office in the area. It is important to document exceptions, because documentation will be required when the completion papers are filed.

Rule 16 requires completion forms to be filed within 90 days after completion or 150 days after drilling is completed, whichever is earlier. 3.16(b)(1). As horizontal drilling became more common, operators realized that due to extended flowback periods necessary to stabilize horizontal well production, compliance with the due dates for Rule 13 filings was very difficult, and the rules now applicable to UFT fields provide for longer time periods for filing of completion papers. It is also common to see such language in special field rules for fields that are not specifically designated as UFT fields.

A key provision of Rule 16 that can be overlooked to an operator's peril is Section 16(b)(2) which requires operators to file a new completion form within 30 days of any physical change to the wellbore downhole. For example, a new completion form is required when perforations are added or squeezed off, when an operator adds a liner or tubing or sets a cast iron bridge plug (even

²⁸ Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 131 S.W.2d 73, 81 (1939) (emphasis added).

uncemented and not permanent). Keeping information at the Commission updated is important for compliance and as self-protection. Texas courts can and do consider Commission records as reliable sources that should be looked to when considering statutes of limitation for example. (cite) Completion forms are also useful tools for research. They contain information relating to the downhole configuration of a specific well, but also zones encountered, perforated intervals, whether and where fracing or other stimulation has occurred, initial producing rates for oil, gas and water, and dates of initial drilling, rig release and production.

The primary forms required at completion are the W2 (oil), and G1 and G5 (gas). These forms are accompanied by additional filings that provide more detailed information relating to the drilling, completion and producing characteristics of the new well, as well as the identification of the entities that will market, purchase and transport the production (Form P-4). This is referred to as the "completion packet." A completion form P-16 will also be required setting out the acreage that is actually assigned for proration purposes, as distinguished from the drilling permit P-16 that shows what is available and could be assigned. The drilling permit P-16 shows the Commission that an operator has enough acreage to meet minimum density requirements. The completion Form P-16 is intended to show compliance with Rule 40. When a well is completed, the operator assigns acreage to that well for proration purposes. The acreage amount can be increased, decreased or reconfigured, if authorized by applicable rule and any underlying legal right to develop (lease, pooling agreement, production sharing agreement). However Rule 40 provides that acreage assigned to a producing well cannot be assigned to any other completed and producing well that is carried in the same Commission-recognized field. The purpose of this prohibition arose in the context of Commission-recognized fields that were coterminous with a common pool or source of supply. Where the Commission authorized one well to produce a set volume (its allowable) based

on surface acreage (presumably reflecting that well's approximate drainage area), allowing two wells to use the same surface acreage would result in both wells draining the same hydrocarbon pore space. Such production would not be preventing waste and could result in harm to the correlative rights of other operators in the same common source of supply.

As horizontal well development became more common and the shale plays were expanded to multiple zones in the same geographic area, the application of Rule 40 became a significant regulatory roadblock. Recognizing that wells in discrete benches within UFT fields would not drain the same hydrocarbon pore space, the Commission has adopted modifications to Rule 40 that continue to prevent waste and protect correlative rights, while removing an unnecessary regulatory bar to effective and efficient development of reserves. In UFT designated fields, the same surface acreage can be used by multiple wells and the field density and proration unit rules apply independently to horizontal wells and vertical wells. Acreage assigned to horizontal wells does not count against acreage assigned to vertical wells, and acreage assigned to vertical wells does not count against acreage assigned to horizontal wells. Density and proration unit requirements as between horizontal wells must still be met. The same applies to vertical wells. The key modification applicable in UFT fields is that the Commission now recognizes that where ownership of the right to drill or produce from a tract in a UFT field is divided horizontally, acreage may be assigned to more than one well provided that the wells are each producing from a unique ownership interval. This differing ownership interest will be honored even if the operator is the operator of all of the ownership intervals.

Rule 40 now also provides for an explicit exception process to allow double allocation of acreage. The process provides for notice to adjacent offsets and to interest owners above or below the target zone for development that requires a Rule 40. If an offset, overlying, or underlying operator, or a lessee or unleased mineral interest owner concludes, as a result of receiving such notice or on some other basis, that an operator has assigned identical acreage to two or more concurrently producing wells in violation of this section, the operator or owner who has concerns may file a complaint with the Hearings Division to request that a hearing be set to consider the issues raised in the complaint. The complaining party bears the burden of proof in objecting to the acreage assignment.

A final area of Commission regulation that could, and should, involve some input from a lawyer or the land department relates to the movement of produced fluids to market. Very often a decision about how a well is configured to separate, measure, treat and transport the constituent components of production from the wellbore are made before or at the time of completion because surface facility decisions must be made before a well is drilled. Statewide Rule 26 requires wells producing gas and liquid hydrocarbon from the same stratum to separate the fluids. Hydrocarbon liquids must be measured before they leave the lease from which they are produced. Rule 27 requires each natural gas completion to be measured separately, except full well stream production going to a plant or central separation facility. This means that gas wells must be measured at the wellhead. "Measured" means "a determination of gas volume...including accurate estimates of unmetered gas volumes released into the air or used as fuel. "Full well stream production must be measured, with each completion being separately measured, in accordance with Rule 55. For commission purposes, every oil lease and every gas well must be measured at the well or tank associated with the well. With the advent of production sharing wells and allocation wells, requesting exceptions has become much more common because every PSA well and every allocation well has a unique lease number.

The Commission authorizes surface commingling of hydrocarbon fluids for common storage or off-lease storage of produced liquid hydrocarbon and commingling of produced gas streams administratively if the operator measures the production stream and its constituent components separately as required, or if the tracts and reservoirs have identical working and royalty interest both as to person and percentage. Commingling of multiple streams is efficient and cost-effective. Operators like to conduct operations that are efficient and cost effective. The Commission rules provide for obtaining exceptions to Rules 25, 26, 27 and 55 to allow for such commingling, and also for exceptions to the measurement requirements. Operators like to obtain these exceptions.

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If exceptions to the separation and measurement requirements are necessary to prevent waste, promote conservation or protect correlative rights, and the interest ownership is not identical, the operator must give notice of the exception request to all working and royalty interest owners. The notice period runs 21 days. The standard is "reasonable allocation." The applicant must demonstrate to the Commission or its designee that the proposed commingling will prevent waste, promote conservation and not harm the correlative rights of the working or royalty interest owners of any of the wells to be commingled. "The method of allocation of production to individual interests must accurately attribute to each interest its fair share of aggregated production. In the absence of contrary information, (like material fluctuation of production), the Commission will presume allocation based on a semi-annual test "will accurately attribute to each interest its fair share of production without harm to correlative rights." All of these requests for authority are submitted on a Form P-17 or P-17a.

No regulatory analyst should file a Form P-17 or P-17 at the time of completion or thereafter without review by a landman or a lawyer. Only they can provide the analysis of whether

the interest owners in the wells to be commingled and/or for which exceptions to measurement might be sought are identical as to percentage and kind. Such a determination will be the basis for a service list if there is not identity of interest. More importantly only a lawyer or landman can determine whether obtaining an exception to measure or commingle will violate the terms of a lease. Just because the Commission can and will grant the exception doesn't mean an operator is authorized to request it. Obtaining Commission authority does not insulate an operator from the consequences of the lease provisions. For example, even if the Commission approves a commingling application, the General Land Office requires a completely separate request for authority to commingle, and it does not, and will not, agree that calculation of production based on the most reliable testing methodology is "measurement" of the individual components of the produced stream at the wellhead for purposes of lease compliance. Legal input may not affect the operational choices but will provide a more appropriate assessment of risks and benefits to the operator.

III. PRORATION AND ALLOWABLES

A. What Does the term Proration Unit Mean?

Once a well is drilled and completed, it must be assigned an allowable by the Commission in order to produce. This is simply a number, expressed in barrels or mcf per day, that the well is allowed to produce. To be entitled to an allowable, acreage must be available to be assigned to the well which has not been already assigned to a different well in the same field. In the old days, this specific acreage was known as a proration unit. In modern fields, geographically specific units are not created; indeterminate acreage is assigned, until the total from the lease has been used up.

B. The historical roots of proration of production.

To recap, in Texas, an oil and gas lease is a determinable fee. Generally, a lessee of the mineral interest owner is granted the right to develop and produce oil and gas for his own benefit and for the benefit of the owner of the mineral interests, in and under certain geographic areas, until production of oil or gas from the property ceases. This is a broad grant of rights, with very little limitation. For many years, the basic operating provisions included a habendum clause, a clause identifying the primary term, a royalty clause and (perhaps) a pooling clause. One producing well could hold a thousand acres. Over time Lessors sought to ensure that development and production would be steady, consistent and comprehensive. Courts implied certain obligations, such as the implied covenant to reasonably develop the lease and the implied covenant to protect the lease from drainage. Lessees sought to retain the opportunity to develop and produce oil and gas reserves at their discretion, with flexibility to choose when and how to develop and produce the area under lease. Lessors and lessees of oil and gas interests (or more particularly, their counsel) began to modify the terms of basic oil and gas leases in ways each deemed beneficial to its interests.

Over the past 54 years, the term "proration unit" has come to be inserted more and more frequently in retention and release clauses by lessors and lessees seeking to quantify acreage that remains subject to the original lease, and disputes about what the term means to lessors, lessees and to the Commission, have become commonplace. We think parties presume that the term "proration unit" is an objective measure. They presume that the acreage identified as a "proration unit" reflects a base geographic area to be developed (identified and endorsed by the appropriate jurisdictional regulatory agency) which can be referenced in a reasonable and reliable express lease provision, to apply to leased acreage, for development, pooling, release or retention. In other words, lessors presume that a field's proration unit is the area that the Railroad Commission has found, after a technical hearing, a well in the field will drain, and therefore reflects the appropriate development of leased acreage.

Used in leases, the term "proration unit" (or words invoking the proration scheme) is generally intended to substitute for implied common law obligations to develop a lease and to protect the lease against drainage, allowing parties to avoid litigation. We suggest that lease provisions can be, and are, crafted with language that can accomplish these objectives, but using the term "proration unit" as a short hand term, is not the way.

Railroad Commission spacing rules and density provisions, as described above, are intended to provide a framework for development of a reservoir by setting a limit for the closest distance a well may be to another tract or well, and the smallest amount of acreage an owner must have to obtain a permit to drill a well. In combination, spacing and density rules prevent the drilling of unnecessary wells.

At the Commission, the term "proration unit" has a different, very specific meaning, derived from the historical context of Commission regulation of the oil and gas industry in Texas. The term comes from the Latin *pro* meaning "according to" and *ratus*, meaning "calculated." Together, the term *pro rata* means "in proportion to a factor that can be calculated." To "prorate" means to divide, distribute or assess proportionately. Proration is the act of dividing or distributing proportionately, and a unit is a determinate quantity adopted as a standard of measurement. A proration unit is one of the tools the Commission developed to allocate (distribute or divide) authorized production from oil and gas wells in Texas. The amount of oil or gas a well is authorized to produce each day (allowed production, or its "allowable") may be based on well potential, flat per well, acreage and /or any other factor that is "reasonable" and will prevent waste while protecting correlative rights. Railroad Commission rules define the term "proration unit" to

mean "The acreage assigned to a well for the purpose of assigning allowables and allocating allowable production to the well." 16 Tex. Admin. Code §3.38(a)(3). Historically, using the geographic surface area of a tract or portion of a tract as a factor in allocating the volume of oil or gas to be produced from a well arose from the way in which proration of oil and gas production developed in the early part of the 20th century.

To begin, we start with basic oil and gas property law in Texas. Oil and gas in place is real property. Once leased, it is a determinable fee. When oil and gas is produced, it becomes personal property. If oil and gas moves to another tract and is produced from a well on another's land, that person has no liability to the owner of the tract under which the oil or gas originated. This is the rule of capture. In the early decades of the 20th century, as oil and gas reservoirs were discovered across Texas, these basic premises led to helter skelter drilling, rapid and without orderly or scientific basis in nearly every field.

In 1917, the Texas Constitution was amended to include the declaration that the conservation and development of natural resources was a public right and duty, and the Legislature was authorized to adopt laws to ensure such conservation. Concerned about vast quantities of oil sitting in earthen pits, and fire hazards arising from derricks laid out like pickets in a fence across numerous fields, the Texas Legislature adopted the first provisions relating to prevention of waste, and designated the Texas Railroad Commission as the agency to regulate oil and gas operations. At that time, the Commission existed to regulate common carriage of goods by rail, which by then, included crude oil, as the railroads were a primary route of access to market for produced crude. Since market and access were the primary drivers of conservation regulation, the Commission's existing authority over the transporters of hydrocarbons made them the logical choice to regulate oil and gas operations also.

The first field in which proration of production (limitation of production to less than the capacity of every producing well) was undertaken was the Yates Field in Pecos County, in 1927. It was undertaken voluntarily, as a joint effort of the operators seeking to protect the field rather than by Commission intervention.²⁹ In the Yates field, the Commission's field rule order (tracking the voluntary agreement of the operators) expressly provided "[s]aid field shall be divided into tracts of 100 acres each as shown on the plat which the Commission has caused to be made and identified as part hereof, and as the limits of said field may be further extended additional tracts may be added by the Commission. <u>Each such 100-acre tract</u> which is in production <u>shall be considered as a unit for the purpose of proration hereunder</u>." See Texas Railroad Commission, "Rules and Regulations for the Conservation of Crude Oil and Natural Gas," Circular 16-B, issued May 15, 1934 at p. 111 (emphasis added). The underlined language is key. The identified tract is considered a unit for purposes of proration. It is a "proration unit."

The first Commission-issued proration order was issued in 1928, for the Hendricks Field. By the 1930s, proration like that adopted in the Yates field was being applied more frequently as

²⁹See "A Chronological Listing of Important Historical Events, Legislative Acts, Judicial Decisions, Orders and Other Relevant Data, Regarding the Railroad Commission of Texas, issued by the Railroad Commission of Texas, revised October 1, 1980, and attached to "The History, Purpose and Organization of the Commission," Nugent, James E., Chairman, Railroad Commission of Texas State Bar of Texas Institute, Oil & Gas: Texas Railroad Commission Rules and Regulations, 1982; see also Prindle, David, Petroleum Politics and the Texas Railroad Commission (University of Texas Press 1980) for the best one volume history of early regulation and the following contemporaneous law review articles: Robert E. Hardwicke, "Market Demand as a Factor in the Conservation of Oil", First Annual Institute on Oil and Gas Law (Southwestern Legal Foundation 1949); Robert E. Hardwicke, "The Rule of Capture and its Implications as Applied to Oil and Gas, 13 Tex. L. Rev. 391 (1935); Robert E. Hardwicke, "Legal History of Conservation of Oil in Texas," p. 214-268, in Legal History of Conservation of Oil and Gas: A Symposium (Chicago: Mineral Law Section of the American Bar Association, December 1938); Maurice Cheek, "Legal History of Conservation of Oil in Texas," p. 269-268, in Legal History of Conservation of Oil and Gas: A Symposium (Chicago: Mineral Law Section of the American Bar Association, December 1938).

a regulatory tool by the Commission to other fields as well. *See e.g.* Oil and Gas Circular 16-B pp103-108, setting out special field rules for the Howard-Glasscock Field and the Ector or Penn Pools. The Commission rules for each of these fields provided the requirement that the field be divided into tracts of forty acres each or fractions thereof, and incorporated the density component into the calculation of individual well production allowed. Neither specifically used the language "unit for proration purposes" as the Yates field rule language did. From this early effort it was clear that the Commission and many of the operators aimed to craft rules that would effect orderly and scientific development of the reservoirs being produced, with a combination of well spacing, density of development and regulation of flow from individual wells.

Then the East Texas field was discovered. Wells were easy and cheap to drill into the shallow Woodbine oil formation, and the field was filled with small operators. At the height of unlimited drilling, production from the field exceeded one million barrels of oil per day. It was said that a person could walk from derrick floor to derrick floor across the entire field and never see ground. Regulation by the Commission was not welcomed. Although spacing rules were in place, exceptions were easily obtained, and the Commission's efforts to limit production by prorating flow were repeatedly, successfully, attacked in the courts, *See e.g. MacMillan v. Railroad Commission*, 51 287 F.2d 576 (W.D. Tex. 1932), rev'd per curiam, 287 S. Ct. 223 (1932), *Henderson v. Railroad Commission*, 51 F.2d 400 (W.D. Tex. 1932), *People's Petroleum Producer's Inc. v. Smith*, 1 F. Supp. 361 (E.D. Tex. 1932).

Eventually the Texas Legislature was able to enact comprehensive legislation prohibiting production of oil and gas in a manner that causes waste, and authorizing the Commission to adopt orders and rules to prevent waste that withstood legal challenge. (Original version at 1935 Tex. Gen. Laws Ch. 76, now found in TEX. NAT. RES. CODE Chapter 85 and 1935 Tex. Gen. Laws Ch.

120, now found at TEX. NAT. RES CODE Chapter 86). Pursuant to its broad grant of authority, the framework for Commission proration of production from wells in the state commenced with setting a statewide amount of oil and gas to reflect "reasonable market demand" for each and every month so that neither oil nor gas is produced in excess of demand. (This was easier to accept for oil, because production in excess of market demand was more clearly tied to excessive and wasteful storage of oil at the surface, including loss from fire, evaporation and leakage). The "statewide" potential volume to be produced was then divided among all of the producing oil and gas fields and then within each field, to each lease and well.

As *between* fields, the statutes require the Commission to apportion the volume authorized to be produced for the month without discrimination and in a manner that does not result in underground waste, such as a volume of production that would result in the dissipation of reservoir energy. TEX. NAT. RES. CODE §85.054, §86.085, and §86.087. The relevant statutory language for allocation of oil *within* a field provides that the Commission shall distribute, prorate, or otherwise apportion or allocate, the allowable production among the various producers on a "reasonable basis" See TEX. NAT. RES. CODE ANN. 85.053(a). For gas, Section 86.089 of the Natural Resources Code provides:

(a) In determining the daily allowable production for each gas well in a prorated reservoir, the commission shall take into account:

(1) the size of the tract segregated with respect to the surface position and common ownership on which the gas well or wells are located;

(2) the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and

(3) other factors that are pertinent.

(b) In determining the daily allowable production for each gas well, the commission shall not take into account the size of the tract on which any gas well or wells are located in excess of the efficient drainage area of the well or wells. The drainage area shall be determined by the commission.

(c) In ascertaining the drainage area of a well, the commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

TEX. NAT. RES. CODE §86.089. Note the difference in detail, and remember that most of the unconventional fields currently being developed are oil fields. Equally important, oil fields are still prorated, and oil wells, especially new horizontal oil wells, can be allowable constrained.

Although early Commission orders in both oil and gas fields included an acreage component, per well and per well potential factors were primary factors for proration until the 1960s. This is because Texas courts supported the right of small tract owners to obtain a drilling permit and complete at least one well even on tiny tracts, as exceptions to Rule 37, to prevent confiscation and protect correlative rights. *See Railroad Commission v. Humble Oil & Refining Co.*, 193 S.W.2d 824 (Tex. Civ. App. -- Austin 1946, writ refused n.r.e.), affirmed per opinion 331 U.S. 791, 67 S.Ct. 1523 (1947) (the "Hawkins Case"). (Stating, in dicta, that allowable for small tract would not be cut down to the point where it could not be drilled and operated at a reasonable profit). The Commission subsequently worked to stem the tide of applications for spacing and density exceptions by the adoption of the voluntary subdivision rule, and by the requirement that the applicant prove that the exception was necessary to prevent waste or protect correlative rights, but small tract owners were still the beneficiaries of significant allowable advantage in fields with any per well factor. For example, in the Normanna Field, under a 1/3 per well, 2/3 surface acreage proration formula, the 1/3 per well factor was so significant that it resulted in allowable

assignments that gave a gas well on a .3 acre tract the ability to produce over 200 times as much gas as the well on the adjacent 230 acres. *See Atlantic ref'g Co. v Railroad Commission*, 346 S.W.2d 801 (Tex. 1961). Because this kind of disparity existed in many fields with a per well factor, the Commission began to move toward surface acreage as the significant factor in proration of production among wells within a field to prevent what clearly amounted to confiscation of reserves by small tract owners draining away production from adjacent tracts. *See Halbouty v. Railroad Commission*, 357 S.W.2d 364 (Tex. 1962); *Railroad Commission v. Shell Oil Co.* 369 S.W.2d 363 (Tex. Civ App. -Austin) affm'd 380 SW2d 556 (Tex 1964).

Historically, the move toward Commission reliance on a surface acreage based "proration unit" as metric for assignment of allowable production to wells within a field was a defensive move intended to prevent confiscation.

Consequently, there is nothing in the history of the Commission's regulation of oil and gas fields that supports a conclusion that a "proration unit" was intended to be the objective metric for effective and efficient development of a reservoir, much less the objective demarcation of the appropriate density of development on any given lease or tract. The Commission's statutory authority obligates it to adopt rules that prevent waste to a reservoir, not individual tracts or the interest owners in any tract. Although the Commission's rules cannot result in confiscation, prevention of waste outweighs protection of correlative rights. *See Texaco v. Railroad Commission* 583 S.W.2d 307 (Tex. 1979). Spacing and density provisions in field rules are intended to prevent waste by providing a geographic pattern for development, by identifying a minimum amount of distance between wells and the minimum amount of acreage necessary to obtain a drilling permit. This prevents the drilling of unnecessary wells. It is important to note that these regulations identify the floor for optimal development, not the ceiling. To drill closer,

or on smaller tracts is wasteful and may harm correlative rights. That is why exceptions to spacing and density require evidence that the exception is necessary to prevent waste or protect correlative rights. The fact that field rules provide that drilling at spacing and density below the standard unit adopted is wasteful or may harm correlative rights does not mean that the converse is automatically true.

In fact, many reservoirs, especially those being developed now, require flexibility to find the appropriate spacing and density to achieve the most effective and efficient recovery of the reservoir. That is why optional density units were developed. See e.g. Railroad Commission of Texas Oil and Gas Docket No. 06-0263732, Application of NFR Energy LLC to Amend the Field Rules for the Woodlawn (Cotton Valley) Field, Harrison and Marion Counties, Texas (Order Issued February 23, 2010) as an example of the complexities parties are unaware of or actually ignore when automatically presuming a field rule provision is a template that can be relied upon to "establish" appropriate density of development. In this case, the applicant sought to amend gas field rules in a Cotton Valley field from a "standard" drilling and proration unit of 640 acres (plus 10% tolerance), with 80 acre optional units. The applicant sought to downsize the optional units to 40 acres to allow for additional infill drilling on tighter density where the existing optional 80 acre provision was leaving recoverable gas behind. Under the amended field rule adopted as requested, the base proration unit remained 640 acres, and each proration unit containing less than 640 acres was identified as "a fractional proration unit." Additional acreage for proration purposes could be assigned to horizontal well proration units according to statewide Rule 86, based on the lateral length of the wellbore from first to last take point. Factually, the applicant submitted a study of 258 gas wells (all of the gas wells in the field) which showed that drainage areas for individual wells varied from less than 1 acre to 392 acres. The very purpose of the rules adopted

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was to honor the fact that the 640 acre base unit, while still appropriate because some wells in the field drain in excess of 320s, was not the end of the analysis. In this field, as in many others, there could be no single template to apply to encourage scientific and orderly development in the field or assignment of "proration unit" size. Why? Because a determination of the effective and efficient development of a reservoir is not fixed in time. It changes with knowledge. And also because a "proration unit" is intended to provide a tool for increasing or decreasing allowed production from a wellbore, in a manner that *affects*, but *does not dictate*, drilling and development, while protecting correlative rights by preventing drainage and mere acceleration of production that could be drained by existing wells.

C. Current Practice

Today, all of the statutory bases for proration, as well as the rules adopted to implement them, still exist. The Commission, every month, issues a "proration schedule" which lists each producing well in Texas, by field, and its daily allowable production. Most wells, but not all, will be allowed to produce their maximum potential production, under applicable field rules. The Commission has not, in other words, restricted production based on non-geologic (i.e. market demand) factors since the 1970s.

In the Spring of 2020, the COVID-19 outbreak spurred a collapse in the demand for oil, which was coupled with an inability amongst members of OPEC+ to agree to voluntary production cuts, causing an historic collapse in the price of oil. Major oil purchasers sent notice to producers that interruptible contracts were being cancelled and oil might not be picked up in May. On March 30, 2020, Pioneer Natural Resources USA, Inc. and Parsley Energy Inc. filed with the Commission a joint Motion Requesting a Market Demand Hearing pursuant to Section 85.049 of the Natural
Resources Code. In other words, they asked the Railroad Commission to impose market demand proration, something that had not happened since the 1970s.

The statutory basis for market demand proration is old, but it is still on the books. The Natural Resources Code states: "The production, storage, or transportation of oil or gas in a manner, in an amount, or under conditions that constitute waste is unlawful and is prohibited." Tex. Nat. Res. Code §85.045. A lengthy definition of waste is provided, which includes: "production of oil in excess if transportation or market facilities or reasonable market demand, and the commission may determine when excess production exists or is imminent and ascertain the reasonable market demand." Tex. Nat. Res. Code §85.046(10).

On April 14, 2020, the RRC held a public Open Meeting on the Motion, at which some 47 interested persons spoke. Of those 47, 18 spoke in favor of proration, 21 spoke against proration, and 8 were neutral. As a general matter, the larger producers (other than Pioneer and Parsley) plus the industry trade groups opposed proration, while the smaller operators were in favor of it. Almost none of the speakers and commentators opposed to proration argued that the Commission lacked the legal authority to re-impose market based proration.³⁰ Instead, they generally argued that either (a) the Commission should not do it because the Commission should not interfere with the markets, which were automatically and voluntarily addressing the situation, or (b) there would be no practical benefit from proration, as Texas production alone was no longer sufficient to affect global supply, or (c) the problem facing the Commission is more a demand problem than a supply problem, or (d) even if the Commission were inclined to impose market demand proration, it no longer had the staff or resources adequate to manage it.

³⁰ A significant exception was XTO Energy, which filed written comments pointing out that the operative provisions of the Natural Resources Code were enacted at a time when oil was stored in earthen pits, and it was not physically possible to shut in oil production. So long as voluntary shut-ins are technically feasible, argued XTO, Section 85.046(10) can never apply.

On May 5, 2020, the Commission issued an Order denying the Pioneer and Parsley Motion, 2-1 (with then-Commissioner Sitton being in favor of proration). While the proration proceedings themselves did not result in the imposition of curtailment based on market constraints, they offered a fascinating glimpse into the manner in which the "industry" views its relationship with its primary regulator. As has long been the case in Texas, the larger producers seem to view regulation as an improper influence on the markets, while the small producers view the Commission as a necessary protector given their inherent disadvantages in the marketplace as compared to the bigger companies.

IV. CONCLUSION: WHEN THE REGULATORY FRAMEWORK CONFLICTS WITH THE CONTRACTUAL FRAMEWORK

In Texas, then, operators are allowed to largely dictate where wells are drilled and how much they may produce. They must do this subject to RRC rules and file the required forms, but the Commission relies on the operator to provide correct information and data on those forms. The Commission also does not make an independent determination of whether the operator has an underlying contractual right to do that which the regulations would permit. This means that from time to time, after the fact, the regulatory choices will be challenges in the court system. What does this look like?

A seminal case was 1965's *Jones v. Killingsworth*. The oil and gas lease in *Jones v. Killingsworth* allowed for pooling, subject to the following limitation on the size of a pooled unit that could be created:

Units pooled for oil hereunder shall not substantially exceed 40 acres each in area . . ., provided that should governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size with those prescribed by governmental regulations.

Id., at 327. The operator/lessee (Killingsworth) created a 160 acre pooled unit,³¹ the West Poynor

Unit, drilled an oil well on it, and completed the well in the Fairway (James Lime) Field. Id., at

326-27. At the time, the Railroad Commission field rules for that field provided as follows:

RULE 2: The acreage assigned to the individual oil well for the purpose of allocating allowable oil production thereto shall be known as a proration unit. No proration unit shall consist of more than eighty (80) acres except as hereinafter provided . . . All proration units, however, shall consist of continuous and contiguous acreage which can reasonably be considered to be productive of oil.

Provided, however, that operators may elect to assign tolerance of not more than eight (80) acres of additional unassigned lease acreage to a well on an eighty (80) acre unit and shall in such event receive allowable credit for not more than one hundred sixty (160) acres.

Id., at 329.

The landowner in the case, Ms. Mildred Jones, argued that while these particular field rules may have "permitted" 160-acre proration units, they "prescribed" 80-acre units. The trial court and the intermediate court of appeals did not agree with Ms. Jones, but a 6-3 majority of the Texas Supreme Court did, writing:

The fact that the Railroad Commission may *permit* a much larger unit cannot be read into the lease contract when, as here, the authority to create larger oil units is expressly limited to units of the size *prescribed* by the Railroad Commission. The Commission *prescribed* a unit of 80 acres. [The field rules clearly say that there *must* be a proration unit of at least 80 acres, and there *may* be larger units of not more than 160 acres.] It is true that the pooling provision contains the word 'permit' as well as the word 'prescribe.' It is not unreasonable to assume that the parties to the lease contract intended, by the use of both words, to give each a distinctly

³¹ The unit was actually 170.86 acres, but "the parties deal with this unit as though it contains only 160 acres."

different meaning. The parties obviously knew when the lease contract was executed that a *permitted* oil proration unit could conceivably be much larger in area than one *prescribed* by governmental authority. To say that a lessee can pool lessors' land with units of any size *permitted* by the Railroad Commission would defeat the intention of the parties to restrict the size of the units to the size *prescribed* by governmental authority.

Id, at 328 (emphases in original).

The result here can be fairly characterized as harsh. One could certainly argue that the intent of the pooling clause was to allow the size of a pooled unit to relate to a size reasonably related to the productivity of the well drilled on it. Indeed, this is the point raised by the first dissent in *Jones*.

In his dissenting opinion, Justice Hamilton points out that the field rules order for the Fairway (James Lime) Field expressly finds that the data adduced show that discovery well for the field had a radial drainage area that exceeded 160 acres. *Id.*, at 330. Consequently, argues the dissent, since the creation of the larger proration unit was expressly allowed, and consistent with a reasonable course of development of the leasehold, a "liberal interpretation should be given to the pooling provision." *Id.*, at 331. "It can be reasonably concluded that from said pooling provision the parties intended for the authority to pool to extend to any unit size substantially conforming to any unit standard officially established by the Railroad Commission in the exercise of its spacing proration function." *Id.*

In other words, Justice Hamilton urged the Court to fix what he believed to be an inartfully drafted sentence in the pooling provision. The problem, of course, is that the pooling provision in Ms. Jones' lease says what it says. By initially using two words that do not mean the same thing - permitted and prescribed -- and by then, in the operative clause, only using the word prescribed, Ms. Jones' pooling provision demanded that the Court honor the difference in meaning between the two words. The pooling provision may have required a harsh result, but it also put the Supreme

Court to the dilemma of whether to hold the parties to the words written, or to allow them to be governed by what the Court thought they probably meant to write. The majority in *Jones* elected to go with the former.

And these issues persist. The Texas Supreme Court continues to be asked to construe private oil and gas lease language in the context of the regulatory framework.³² The key question is always: what are the consequences of being wrong? If a drilling permit is issued and later found to have been improperly issued, production from the well is illegal, and the well must be shut-in, re-permitted, or plugged. If an operator makes a proration acreage election that is not what the underlying oil and gas lease contemplated, acreage that could have been earned by production under a lease might have to be released.

comparison by comparison

These unfortunate possibilities are, in the author's opinion, a frankly unavoidable byproduct of a flexible, operator-driven regulatory regime. Texas is the nation's top producer of both oil and natural gas, and it would be the number 4 global producer of crude oil were it its own country.³³ There are many reasons for this, including its sheer size, its favorable geology, and a pro-business tax structure. But the Railroad Commission's flexible regulatory stewardship must also be acknowledged as a key reason for the state's success as an oil and gas producer.

³² See, for example, Endeavor Energy Resources, L.P. vs. Discovery Operating, Inc., 554 S.W.3d 586 (Tex. 2018); XOG Operating, LLC vs. Chesapeake Exploration Limited Partnership, 554 S.W.3d 607 (Tex. 2018).

³³ Texas Oil and Gas Association's 2021 Annual Energy & Economic Impact Report, located at https://www.txoga.org/2021eeir/.

LSBA: Who We Are and How We Serve our Members



Serving the Public. Serving the Profession.

Formation of the LSBA

Act 54 of the 1940 Legislative Session

Authorized the Supreme Court to create the Louisiana State Bar Association and require all lawyers practicing law in Louisiana to be members

• March 2, 1941

LSBA organized as Louisiana corporation



How many lawyers?

• Eligible LA Attorneys:

- 23,038
- (in good standing)
 - 07/01/2021

The Generations

- Professionalism
- Veterans/The
- Silent
- Generation –
- 1945 and earlier
- Baby Boomers –
 1946 to 1964
- Generation X 1965 to 1980
- Millennials –
 1981 to 2000
- Generation Z –
 2001 to 2015



Generational Traits

- Veterans
 - Believe you earn your own way through hard work
 - Value conformity and conservatism
 - Favor top-down chain of command
- Baby Boomers
 - Hardworking and motivated by position, perks and prestige
 - Achievement oriented and career focused
 - Competitive in workplace

- Generation X
 - Technologically adept
 - Independent, resourceful and self-sufficient
 - Willing to change jobs to get ahead
- Millennials
 - Feel pressured to succeed
 - Prefer egalitarian leadership, not hierarchies
 - Motivated, goal-oriented, confident in themselves and future









Professionalism





Compared to Last Year



Professionalism



Regulatory Functions

LSBA

- Judges and Lawyers Assistance Program
- Maintenance of attorney database and single billing
- Legal Specialization
- Practice Assistance and Improvement Program
- MCLE Committee on Continuing Legal Education

AFFILIATES

- Lawyer Discipline LA Attorney Disciplinary Board and Office of Disciplinary Counsel
- Bar Admissions Committee on Bar Admissions





House of Delegates

- Policy-making body comprised of one elected delegate for each district judge
- Delegates meet twice a year and serve two-year terms with attendance requirement of 50% of all meetings or 50% of in-state meetings, whichever is less
- Charged with:
 - Approving proposed amendments to Bylaws and HOD Rules of Procedure
 - Recommending to members proposed amendments to Articles of Incorporation
 - Considering resolutions submitted by individuals, committees, etc.
 - Establishing policies which guide legislative positions
 - Electing its members to serve on boards and committees



Board of Governors

- Vested with administration of Association, including fiscal responsibility
- Authorizes appointments to fill vacant LSBA positions, and for representatives to outside groups
- Recommends appointments to the Supreme Court
- Approves strategic plan and monitors progress
- 23 voting members including ex-officio members, elected members and at-large members
- Terms of one, two or three years, depending upon position
- Meets no less than six times per year



Board Voting Members

- Officers President, President-Elect, Secretary, Treasurer and Immediate Past President
- Young Lawyers Division Chair
- Ten District Representatives Two each from Districts One and Five, and one each from Districts Two, Three, Four, Six, Seven and Eight
- Three At-Large Representatives each President appoints one with approval of Board of Governors
- Representative of Louisiana State Law Institute
- Two Law School Representatives Tulane and LSU alternate terms with Loyola and Southern
- House of Delegates Liaison Committee Chair



HOD Liaison Committee

- Elected by and from the House of Delegates at Midyear Meeting for terms beginning at start of next fiscal year
- Comprised of three members, with one elected annually by the House to serve as Chair
- Committee members serve three-year terms
- Chair has all rights and responsibilities of other Board of Governors members, including right to vote



Executive Committee

- Comprised of President, President-Elect, Secretary, Treasurer, Immediate Past President and Executive Director (non-voting)
- Reviews matters of importance to Association and makes recommendations to Board of Governors and/or House of Delegates
- Between meetings of the Board and/or House, Executive Committee serves as executive council and may act upon all emergency and other matters not theretofore determined by either the Board or House



<u>Professionalism</u>

Young Lawyers Division



- Members who have not reached age 39 or who have been admitted less than 5 years
- Governed by YLD Council
- Leaders elected for one- or two-year terms
- Funded through general fund via budget line item



Senior Lawyers Division



- Created in 2012
- Members age 65 and older
- LSBA President appoints officers for one-year terms: Chair, Vice-Chair and Secretary/Treasurer
- Funded through general fund via budget line item



Committees

- Committees and leaders appointed by President under authority granted by Board of Governors
- Exceptions:
 - Budget composition set forth in Bylaws
 - Legislation 15 members elected by and from House of Delegates, Presidents appoints 10
 - Nominating elected by members





Sections

- Created by the House of Delegates
- Members elect to join by paying voluntary dues
- Responsible for payment of expenses in connection with activities
- Pay \$10 per member annual administrative fee
- Section Council comprised of section chairs
- Section chairs are voting members of House
- Must comply with reporting and budgeting requirements set forth in Bylaws



LSBA Dues



- \$200 for those admitted more than 3 years; \$80 for 3 years or less
- New members pay at time oath administered
- Members admitted 50 years or more are exempt
- Board may grant hardship waivers
- Failure to pay timely results in certification of ineligibility and \$50 fine
- Inactive members exempt
- Current structure adopted in 2007



Louisiana® State Bar Association Serving the Public. Serving the Profes

Practice Assistance and Improvement Committee

- Attorney-Client Assistance Program
- Alternatives to Discipline Programs
- Practice Aid Guide
- "What to do when a Complaint is filed against me?" Video
- Disciplinary History on Fastcase (Under Construction)

Attorney-Client Assistance Program

- Created in 1998
- The program was designed to facilitate/mediate resolution of minor complaints without the need for formal investigation.
- Complaints are screened and referred by the ODC to LSBA Practice Assistance Counsel to attempt to resolve between the parties.
- Successful resolution is considered an administrative closure by ODC and no formal file or investigation is ever opened by ODC.



Attorney-Client Assistance Program

- Frequent complaints that are referred to the program can be:
 - Communication
 - Fees
 - Diligence
 - Return of file
 - Since inception of the program there have been over 5000 referrals with a 90% success rate of resolution of the underlying complaint.



LSBA Diversion Program

- Since inception of the program in 1998 there have been 569 referrals for post-investigative diversion. Participants sign a contract which can entail many different conditions depending on the underlying rule violation.
- Conditions can include: Ethics School, Trust Accounting School, Law Practice Management Program, Stress Reduction Workshop, Advertising School, Fee Arbitration and more.



Ethics School

- An entire day devoted to Ethics and discipline avoidance.
- Topics include:
 - The Attorney-Client Relationship
 - Conflicts of Interest
 - Law Practice Management
 - Trust Accounting
 - Avoiding Fee Disputes
 - Judges and Lawyers Assistance Program
 - Avoiding Common Complaints



Trust Accounting School

- A three hour course taught by either a CPA/Attorney or LSBA Ethics Counsel dedicated to both the technical ethical rules as well as the practicalities of balancing an attorney-client trust account.
- Many attorneys are referred as a result of the Overdraft Notification requirements.



Law Practice Management Program

- Includes Ethics School as well as a half day consultation with LSBA Practice Management Program, Gilsbar Loss Prevention Counsel and LSBA Practice Assistance Counsel.
- Topics include:
 - The essentials of law practice management
 - Technologies of law practice management
 - What I wish had known about starting a law practice.
 - Trust Accounting programs for small/solo firms
 - Practice Management programs
 - How not to get a Complaint



Stress Management Workshop

- The practice of law is one of the most stress filled professions in society today.
- The Stress Management Workshop is a free half day CLE designed to assist lawyers in dealing with the stresses of the profession
- Taught by a Clinical Psychologist and by the Executive Director of the Judges and Lawyers Assistance Program.



LSBA Advertising School

- A half day program dedicated to the intricacies of Rules 7.1 7.10 of the Rules of Professional Conduct dealing with attorney advertising
- Taught by LSBA Ethics Counsel



Additional Programs

- LSBA Practice Aid Guide The Essentials of Law Office Management
- Originally published in 2004, it has been updated and expanded in 2017
- Contains forms, contracts, letters and checklists in Word version so adaptable
- Online and can be downloaded as a PDF.



Disciplinary History/Avoidance Website

- The Practice Assistance and Improvement Committee is designing a website to assist lawyers navigate the disciplinary process.
- Included on the site is the Video "What to do when a complaint is filed against you"
- A searchable list of disciplinary cases including Disciplinary Board and Hearing Committee opinions is being developed by Fastcase for use by all LSBA attorneys.
- Other publications that can assist attorneys avoid discipline or malpractice issues.



REVISED CODE OF PROFESSIONALISM

- Approved by the Supreme Court of Louisiana April 11, 2018
- Committee on the Profession Resolution approved by LSBA House of Delegates January 20, 2018
- Revisions include language to update and/or highlight our many professional obligations including:
 - Improving the Image of the Profession
 - Improving the Justice System
 - Professionalism in using Technology and Social Media
 - Service
 - Mentoring
 - Professional Competence



Committee on the Profession Transition into Practice (TIP)

- A mentoring program designed to assist new lawyers transition into the practice of law
- Initially set in New Orleans area, Baton Rouge and Shreveport, the program was expanded in 2017 statewide.
- Mentees are assigned to experienced mentors who meet with them at least 4 times a year as well as attend specific obligations such as attending Federal/State Court, attending a deposition, going to a local or state bar function, and visiting a jail.
- Generally lasts one year and the mentee is responsible for reporting all activities to the LSBA through the mentor website.
- A Spot Mentoring Program for questions on specific issues has been implemented to assist lawyers in the practice 2 – 7 years. https://www.lsba.org/mentoring/spotmentoring.aspx



Volunteer to Become a Mentor

- 10 Years Experience
- In Good Standing and No Public Discipline
- Brief Training session where you receive 2 hours CLE
- To Volunteer go to:

https://www.lsba.org/Mentoring/

Additional 4 hours of professionalism CLE upon successful completion of mentoring by new admittee



Professionalism Starts In the Law Schools

- 1L Law School Professionalism Orientations
- Hundreds of volunteer attorneys serve on Professionalism Panels on the first day of law school.
- LSU
- Tulane
- Southern
- Loyola

To volunteer, contact connies@lsba.org



Committee on the Profession Law School Programs

- 1L Spring Character and Fitness Programs
 - In second semester of their 1st year, students at all four law schools are educated on the character and fitness requirements for entering the bar.
- 2L Bar Admissions Q&A Program
 - In 1st semester of their second year, students at all four law schools have a presentation designed to assist them complete their Law Student Registration process with the Committee on Bar Admissions and the National Conference of Bar Examiners



Committee on the Profession Law School Programs continued...

- 3L Law School Program
- A panel of volunteer attorneys present a number of video hypotheticals posing ethical and professionalism issues that attorneys face and discuss ways to resolve the problems professionally.
- Designed to prepare students to react ethically and professionally when confronted by unprofessional conduct of others
- Additional programs dealing with law school debt as well as initiatives to assist attorneys out 2-7 years under study.



Online eBook "Shelf" www.lsba.org/goto/ebooks



Collection of the LSBA's growing list of online publications dedicated to Practice Assistance. Includes these publications:

- LSBA Practice Aid Guide The Essentials of Law Office Management
- Hanging Out Your Shingle Louisiana Style
- Practice Transition Handbook: Shutting Down a Law Practice in Louisiana
- Disaster Planning: It's Not Just for Hurricanes Are You Ready?

LSBA'S LAW PRACTICE MANAGEMENT PROGRAM



LSBA LAW PRACTICE MANAGEMENT ADVICE

Need personal advice on law practice management issues?

- Opening or closing your office?
- Technology choices?
- Personnel alternatives & solutions?
- Document retention questions?
- Client communication issues?
- Disaster or business continuity issues?

Answers and resources are just a quick email or call away:

Contact Shawn L. Holahan, Esq., <u>shawn.holahan@lsba.org</u>, (504) 619-0153.

LSBA ONLINE TECH CENTER

Need "on demand" assistance? The LSBA Online Tech Center can help!

- FREE Training Videos:
 - On Demand Video Training for Popular Technology Tools
- Publication Links to Important Tech Topics of Note
- And more!

LAW PRACTICE MANAGEMENT CLE PROGRAMMING

Low Cost One-Hour Seminars:

- Management Mondays: Office management topics.
- Tech Tuesdays: Legal tech topics.

FREE Seven-Hour Seminars:

• Four Corners Seminars: FREE seven-hour seminars at Louisiana's four corners. Lunch included!



LSBA SOLO, SMALL FIRM & TECH CONFERENCE

<u>Only</u> two-day, three track conference <u>dedicated</u> to small office practitioners

- Satisfy entire CLE requirement: law office management, legal tech, ethics, professionalism, substantive law & quality of life topics.
- Top legal tech exhibitors to answer questions.
- Network with small office practitioners statewide.

"Best all-in-one CLE there is." "Intelligent, relevant programming."

COVID-19-PRACTICE MANAGEMENT

- COVID19 webinar series was created in response to the rapidly changing legal environment arising out of the initial stages of the COVID19 pandemic. While the series has concluded, the pandemic has not, and we as a legal community will still be responding to the ever-changing landscape for the foreseeable future. For this reason, we are retaining this webpage so that members may access the materials submitted by the various presenters, and be informed as to those recorded COVID19 topics which are now available for on-demand viewing and CLE credit for a fee in the InReach catalog.
- Offered over 40 free webinars to members

COVID-19-WELLNESS

HOME FITNESS IN SMALL SPACES

Louisiana's shelter-in-place order meant members could no longer access their regular gyms and fitness studios. However, fitness experts have devised multiple ways to help people stay in shape while staying at home. LSBA offered helpful resources at Isba.org, produced by Mackie Shilstone, a fitness, wellness, and sports performance expert and former clinical instructor of public health and preventative medicine at Louisiana State Health Sciences Center.

- Home Fitness Videos:
- Maximum Wellness Articles:
- Maximum Wellness Podcast:

LSBA LENDING LIBRARY

Curated Current Law Office Management Titles:

- Technology
- Best Law Office Management Practices
- Setting Up and Closing an Law Office
- Quality of Life & More!

FREE! Easy!

Place order through online form.

We'll even send them to you!

LSBA ATTORNEY FEE DISPUTE ARBITRATION PROGRAM

Have a fee dispute with your client or colleague? Instead of court, try this:

- Quick
- Inexpensive (\$50 -\$100)
- Informal
- Little or no discovery
- Confidential
- Final

FASTCASE

- Most popular LSBA member service: FREE online legal research tool!
 - Case & statutory law for all fifty states
 - All federal district, appellate, & supreme court decisions
- Easy to use from desktop, smart phone or any internet capable device
- User guide tutorials; **FREE** one-hour CLE webinars throughout year.
- Award winning mobile app to access search results with internet.



LSBA DISASTER & BUSINESS CONTINUITY RESOURCES

Be prepared; back up; have a plan!

Unplanned interruptions of business caused by:

- Weather Events
- Power Outages
- Fire, Burglary
- Disability/Death of Key Person
- Disgruntled Employee
- Hacking





FREE Online Publication: LSBA's Disaster Planning: Its Not Just for Hurricanes – Are You Ready?



LSBA's Online Publication for the New Lawyer

- Law Office Business Plan The Basics
- Actual Law Office: Where? What's in it? Name? Office Processes? File Organization? Creating good impressions?
- Attracting the Right Clients for Your Practice
- Client Communications & Client Relations
- Time & Billing

LOUISIAN

• Practice Resources

Rules of Professional Conduct

- Ethics Counsel reviews
 Advertisements for rule Compliance
- Advisory Ethics Opinions, Ethics Counsel
- Drafting Public Advisory Opinions

Professionalism

LSBA Receivership Panels

- Amended Supreme Court Rule XIX, Section 27
- When lawyers become disbarred, suspended, or pass away and there is no qualified successor lawyer able to assist in closing the practice, the LSBA has set up panels of lawyers around the state that can be appointed to assist.
- 5 panels in the appellate circuits. 5 to 10 lawyers in each.
- Panel members are trained and given CLE for participation.
- Must have (10) years in the practice and be in good standing.
- The panels are a last resort for when attorneys have not taken necessary steps to protect their client's interests.
- Generally used as inventory attorney to return the files to the former clients.

Continuing Legal Education

 Approximately (40) CLE seminars per year including out-of-state seminars and program co-sponsored with Louisiana Judicial College

PLUS

- Solo and Small Firm Conference
- Free Four Corners Seminars
- One hour CLEs Marketing Mondays, Tech Tuesdays, Wellness Wednesdays and Ethics Fridays at the Bar Center

Business Discount Services

ABA Retirement Funds Program

Call (866) 812-3580 for a free consultation or visit <u>http://abaretirement.com/welcome/louisiana</u> for more information.

GEICO

Visit <u>http://www.geico.com/bar/lsba</u> or call (800) 368-2734 to see how much you could be saving.

Office Depot

By downloading and printing the free Store Purchasing Card, members can receive up to 80% off Office Depot products (including great copy and print pricing). To download the Store Purchasing Card or to set up an account to shop online, go to: http://www.officediscounts.org/lsba

UPS

LSBA members can save up to 26% on shipping with UPS call (800) 325-7000.

LSBA Webpage (go to Member Resources, Tools and Services, Discount Services) https://www.lsba.org/Members/DiscountBusinessServices.aspx

Hotel Discount Services

Negotiated Rates for the following areas:

Baton Rouge Lafayette New Orleans Shreveport

National Hotel Chains:

Holiday Inn LaQuinta Inn & Suites

LSBA Webpage (go to Member Resources, Tools and Services, Travel Discounts) https://www.lsba.org/Members/TravelServices.aspx



DIVERSITY

LSBA STATEMENT OF DIVERSITY PRINCIPLES FORM

Those signing this Statement of Principles, hereby commit themselves to foster diversity in the legal profession. The LSBA recognizes that diversity is an inclusive concept that encompasses race, color, ethnicity, gender, sexual orientation, age, religion, national origin, disability and other aspects of diversity.

We believe that with greater diversity, we can be more creative, effective and just, bringing more varied perspectives, experiences, backgrounds, talents and interests to the practice of law and the administration of justice. We further believe that a diverse group of talented legal professionals is critically important to the success of every law firm, corporate or government legal department, law school, and public service organization and every other organization that includes attorneys.

We recognize that to fully and equitably pursue justice our profession must reflect the full spectrum of our communities. To this end we pledge to make our best efforts to increase the diversity in our hiring, retention and promotion of attorneys and the elevation of attorneys to leadership positions within our respective organizations. We believe that all members of the bar should participate equally and fully in our profession. Ultimately, we believe that diversity in the legal profession is good for the profession, good for business, good for our communities and critical for enhancing the public's confidence in the judicial system.

We recognize that achieving diversity within our organizations and creating inclusive environments are evolutionary processes that require a continued effort and commitment on our part. We pledge to promote and participate in appropriate diversity awareness training programs. We further agree to participate in programs to measure our progress in the pursuit of these stated principles.

Signed this ______day of ______, 20____,

Name of Firm or Entity Committing to Statement of Diversity Principles

By:

Signature of Party Authorized to Commit the Above Named Firm or Entity


COMMITTEE ON DIVERSITY IN THE LEGAL PROFESSION

- January 24, 2004, LSBA BOG formed Task Force on Diversity
- June 27, 2005, Diversity Committee becomes LSBA Standing Committee
- LSBA's Strategic Plan's Goal 3, which is to ensure that the "LSBA provides the foundation for a supportive and collegial community of legal professionals." That goal encompasses the diversity and inclusion goals for the LSBA and implicitly means that the LSBA will encourage and foster racial, ethnic, gender, geographic, generational, sexual orientation, and disability diversity as well as inclusiveness in the bar and in the legal profession.

DIVERSITY

COMMITTEE ON DIVERSITY IN THE LEGAL PROFESSION

- Composition
 - Presidential Appointment
 - January 17, 2015, Limit Removed
 - Chairperson
 - 20 additional members
 - Ex-officio members
 - 4 Law School Deans or Designee
 - Attorney General or Designee
 - Louisiana Supreme Court or Designee
 - Federal Judge and District Court Judge
 - Reappointment



Professionalism

OUTREACH

OUTREACH COMMITTEE

- Mission: to develop and implement sustained outreach to local and specialty bars throughout the state and to increase awareness of the member services and benefits provided by the LSBA. The committee shall encourage member participation in all aspects of the LSBA, and shall facilitate such participation through the use of technology and any other feasible alternatives.
- January 16, 2016, approved as a LSBA standing committee
- Presidential Appointment
- Citizen Lawyer Award

LSBA LEADERSHIP CLASS

- Created in 2002 by LSBA President Larry Feldman, Jr.
- 2008, class projects
- Application Period
- Class year, August LSBA Annual Meeting in June.
- Requirements
- Recognition

https://www.lsba.org/Members/LSBALe adershipClass.aspx



LSBA'S ACCESS TO JUSTICE PROGRAM

Serving the Public, Serving the Profession



A Brief History of ATJ

ATJ Department & Committee were created after severe cuts in federal funding to LSC

> Access to Justice Policy Committee created

ATJ Commission created by order of the Louisiana Supreme Court

Professionalism

1997

2009

2015

Serving the Public



- **Find Legal Help** on the LSBA website includes:
 - Attorney Directory
 - Modest Means Directory
 - Legal Aid and Pro Bono Organizations by parish
 - Forms and Self-Help services and resources

Modest Means Directory

Home

Members Resources Pu

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Bar Governance News

News/Publications

Modest Means Online Legal Directory

Welcome to the Modest Means Online Legal Directory

A committee of the Louisiana State Bar and Supreme Court has created this directory of attorneys for the people of Louisiana who don't qualify for free legal services, but still can't afford an attorney on the open market.

This directory is designed to help Louisiana consumers obtain legal services at affordable rates. For example, it connects people with attorneys who: charge reduced rates based on client income, charge a flat fee, or charge less because they represent the client for just part of the case and not all of it.

To use this list, you must be income eligible and agree to the terms of use. The directory provides the name of the attorney, contact information, location(s) where their services are available, and practice areas of each attorney, which include business, consumer, criminal, family, housing, successions, estate planning, and more.

This is NOT a referral service. To seek services from an attorney on the list, you must contact him or her directly.

Join the Directory

Modest Means Directory

- 1.3 million people in Louisiana who don't qualify for free legal aid but can't afford market rates
- Directory is a list of attorneys by parish and practice area offering legal services \$75 - \$150 per hour (or flat fee equivalent) for people at or below 400% of the federal poverty level
- Any LSBA member in good standing who offers affordable legal services in Louisiana is eligible to apply



www.lsba.org/atjcommission/modestmeans.aspx

LA.FreeLegalAnswers.org



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To volunteer contact Rachael Mills, ATJ Projects Counsel by emailing rachael.mills@lsba.org or calling 504.619.0104.

FOR MORE INFORMATION, VISIT WWW.LSBA.ORG/ATJ OR CALL (504)619-0104

- Fulfill you pro bono obligation without leaving your office
- Answer civil law questions for lowincome Louisiana residents who qualify
- Receive malpractice coverage for the questions answered through the website

Learn More and Get Involved

- Learn more about the Access to Justice Program activities, available resources, and how you can get involved:
 - View a short video on the ATJ website: <u>www.lsba.org/atj</u>
 - Contact ATJ Directory Monte Mollere at <u>mmollere@lsba.org</u> and ATJ staff at <u>https://www.lsba.org/ATJCommission/ATJContact.aspx</u>







LSBA hashtag

#yourLSBA

to highlight the many LSBA members who work tirelessly on behalf of the public and the profession.

"We have the ability to promote our members – their dedication to the practice of law, the necessary role that they play in our justice system, and the time and resources they devote to their communities."

> Keep up with the hashtag on Facebook, Twitter and Instagram!

#yourLSBA

QUESTIONS?

Louisiana State Bar

ng the Public



Serving the Public. Serving the Profession.

LEGAL ETHICS

RECENT DEVELOPMENTS

2022

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I. LOUISIANA DEVELOPMENTS

A. Permissible Activities of the Louisiana State Bar Association

On September 14, 2021, the Louisiana Supreme Court enacted a new section 6 to Louisiana Supreme Court Rule XVIII ("Roll of Attorneys.") The new section, entitled "Purpose and Scope of Mandatory Bar" provides:

The purpose of the Louisiana State Bar Association (LSBA) as a mandatory and integrated bar shall be to promote and assist the regulation of the practice of law, improve the quality of legal services, advance the science of jurisprudence, promote the administration of justice, uphold the honor of the Courts and of the profession of law including Louisiana's civil law system, and, generally, to promote the welfare of the profession in the State. The LSBA shall limit its activities to those that are constitutionally germane to its purposes, and shall limit its legislative activities to issues involving practice and procedure, the judicial system, access to the courts, the compensation of judges or lawyers, or the legal profession, and to responding to any requests for information received from the legislature. Any legislative positions on issues within the scope of this rule shall be voted upon and approved in advance by the LSBA's Board of Governors and thereafter published to members of the LSBA.

The Louisiana Supreme Court enacted section 6 in response to two recent Fifth Circuit cases considering mandatory membership in state bar associations. On July 2, 2021, the United States Fifth Circuit Court of Appeals in companion cases out of Texas and Louisiana held that states cannot force lawyers to join a bar association that is engaged in activities that are not germane to the practice of law. See *McDonald v. Longley*, No. 20-50448 (5th Cir. Jul. 2, 2021) (holding that because the Texas Bar "is engaged in non-germane activities," forcing lawyers "to join it violates their First Amendment rights"); *Boudreaux v. La. State Bar Assoc.*, No. 20-30086 (5th Cir. Jul. 2, 2021) (holding that Louisiana lawyer has viable claim that LSBA's "political and legislative activity goes beyond what's constitutionally permissible"). These decisions portend significant changes ahead for Louisiana lawyers and the Louisiana State Bar Association.

If those opinions stand, the Louisiana Bar Association will have to make some changes to the way it operates. This is so because the LSBA has engaged in even more non-germane political and ideological activities than the Texas Bar. The *McDonald* case provides at least three options for the Louisiana Supreme Court and LSBA to follow to fix the current problem:

- 1. The Louisiana bar "can cease engaging in non-germane activities."
- 2. Louisiana "can directly regulate the legal profession and create a voluntary bar association, like New York's."
- 3. Louisiana "can adopt a hybrid system, like California's."

The court made clear that Louisiana "may not continue mandating membership in the Bar" if it is engaged in activities non-germane to the practice of law.

B. Lawyer Advertising Rules

The Louisiana Supreme Court issued an order on May 6, 2021, revising the Louisiana Rules of Professional Conduct provisions governing lawyer advertising; those provisions became effective on January 1, 2022.

- Major changes: Lawyer advertisements must display a "filing number" issued by the LSBA. The text of the rule does not exempt already published advertisements from the filing number requirement. Amended Rule 7.2(a)(1) requires that any lawyer named in an advertisement certify that the advertisement was filed and assigned such a filing number. Amended Rule 7.2(a)(3) requires that all advertisements and unsolicited written communications, except those subject to the exemptions stated in Rule 7.8, must include a filing number assigned by the Louisiana State Bar Association. Amended Rule 7.4(b)(2)(B)(iii) requires that unsolicited written communications to prospective clients for the purpose of obtaining professional employment must clearly state the Lawyer Advertising Filing Number assigned by the Louisiana Bar Association.

- Rule 7.2(c)(4) has always provided that a lawyer must not suggest that any communication received approval from the Louisiana State Bar Association. The court's new revision clarifies that the use of a filing number assigned by the LSBA does not reflect approval from the Association.

- Rule 7.2(c)(1)(D) has always prohibited "false, misleading or deceptive" communications. Under the amended rule, a communication may not contain a reference to past results without a disclaimer such as "Results May Vary" or "Past Results are not a Guarantee of Future Successes.

- Amended Rule 7.6(a) clarifies that "computer-accessed communications" includes information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer, namely: Internet presences such as home pages or World Wide Websites and unsolicited electronic mail communications.

The court's new requirement that lawyers submit advertisements to the LSBA *prior to publication* in order to get a "filing number" may be an impermissible prior restraint on commercial speech that violates the First Amendment. The previous advertising rule presented no "prior restraint" issue because it permitted Louisiana lawyers to file with the LSBA "concurrently with the lawyer's first dissemination of the advertisement." See La. Rules of Prof'l Conduct r. 7.7(b). See, e.g., *Mezrano v. Alabama State Bar*, 434 So. 2d 732, 735 (Ala. 1983) (holding that requiring submission of advertisements "shortly after" first publication was not a "prior restraint" on speech). In contrast, the new rule mandates filing *before* the speech can occur, a requirement that raises constitutional concerns.

C. Producing Client's File in Response to a Subpoena

May the lawyer receiving the subpoena produce the client's case file in response to the subpoena?

Probably, but only if the lawyer obtains informed consent from the client *or* the subpoena is a valid court order. *See* La Rules of Prof'l Conduct, r. 1.6; *see also* La. Code Evid, art. 508(A).

Here are a few simple rules to aid in determining when a lawyer can produce the client's file in response to a subpoena:

- As a preliminary matter, the client's file is information relating to the representation of the client. For this reason, the materials in the client's case file are confidential information under Louisiana Rule of Professional Conduct Rule 1.6. *See* La. Rules of Prof'l Conduct, r. 1.6. The lawyer shall not reveal this information *unless* "the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" by the rules. *See id*.
- The Rules of Professional Conduct provide that a lawyer can reveal confidential client information when the lawyer obtains the client's informed consent. Under these rules, "'[i]Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* La. Rules of Prof'l Conduct, r. 1.0(e). If the client consents, the lawyer may produce the client file in response to the subpoena.
- The Rules of Professional Conduct provide that a lawyer can reveal confidential client information when the lawyer reasonably believes the disclosure is necessary "to comply with other law or a court order." A subpoena duces tecum issued to a lawyer for a client's file is a valid "court order" when the issuing lawyer complied with the requirements of Louisiana Code of Evidence article 508(A). *See* La. Code Evid. Art. 508(A). Article 508(A) requires that before a subpoena can issue to a lawyer, the court must hold a contradictory hearing to determine whether the information sought is not protected from any applicable privilege and whether other criteria are met, such as showing that the information is essential to the case and that there are no other alternative means of obtaining the information.
- The client or former client must receive notice of the time, place, and substance of the hearing and have an opportunity to fully participate in that hearing. *See* La. Code Evid. Art. 508(C). Absent such notice, the "determination that a lawyer-client privilege is not applicable to the testimony shall not bind the client or former client." *Id*; *see also Mandy Dardar v. Gary Dardar*, No. 2121 CW 0424 (La. App. 1 Cir. 6/7/21).

The Louisiana First Circuit Court of Appeals recently reinforced these basic principles in the writ disposition vacating the district court's order instructing a lawyer to turn over his client file. *See Mandy Dardar v. Gary Dardar*, No. 2121 CW 0424 (La. App. 1 Cir. 6/7/21). The First Circuit concluded that it was appropriate to vacate the district court's order because the "hearing

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held herein on the defendant's motion to produce failed to comply with the requirements of La. Code of Evid. art. 508(C)." *Id*.

In conclusion, a lawyer's duty of confidentiality is significantly broader than many lawyers understand. Because Rule 1.6 prohibits a lawyer from revealing "information relating to representation of a client," it is not limited merely to matters communicated in confidence by the client. See ABA Model Rules of Prof'l Conduct r. 1.6 cmt. 4. Thus, this rule prohibits disclosure of confidential information from any source, including from third parties and from documents prepared by third parties. This includes producing the entirety of the client's file.

Even in response to a subpoena duces tecum, a lawyer must not hand over the client or former client's file until the lawyer obtains the client's informed consent or after ensuring that the subpoena is a valid court order. The subpoena will not be a valid court order unless the issuing lawyer complied with La. Code of Evidence art. 508's requirement that the court hold a contradictory hearing.

II. PROFESSIONAL MISCONDUCT

A. Coaching Clients on How to Respond

Florida Bar v. James, No. SC20-128 (Fla. Nov. 18, 2021)

FACTS: Derek Vashon James was representing an employer in a worker's comp case. On July 31, 2018, James deposed the employer's adjuster, Gray, over the phone. Claimant's counsel, Toni Villaverde, attended the deposition via phone. During the deposition, James sent text messages to Gray, coaching her on what to say to Villaverde's questions. Villaverde could hear typing and asked Gray and James if they were texting. James denied texting Gray and said he only received a text from his daughter. James then agreed to put his phone away. After a break, Villaverde resumed questioning Gray. James then accidentally sent text messages to Villaverde instead of Gray. The messages were telling Gray how to respond, to avoid providing certain information, to remember a deposition once she noticed the messages. James tried to convince Villaverde that the texts were sent to Gray during the break, not during questioning. During a subsequent hearing, James failed to be transparent with the judge and never produced any texts involving his daughter, despite being ordered to do so by the judge.

VIOLATION: James was found guilty of violating Florida Bar Rule 4-8.4(d), which provides: "A lawyer shall not ... engage in conduct in connection with the practice of law that is prejudicial to the administration of justice..." The Florida Supreme Court "has determined that dishonesty in connection with the practice of law is prejudicial to the administration of justice."

DISCIPLINE: The referee's report recommended that James be suspended for 30 days, but the Florida Bar determined that James should be suspended from practicing law for 91 days.

REASONING: James "knowingly engaged in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system" by attempting to undermine opposing counsel's lawful right to obtain evidence and the adversarial process. James was deceptive by sending secret text messages and then he denied doing so when confronted by Villaverde. He continued this deception after the deposition with both Villaverde and the Judge. Since his conduct was sufficiently egregious, the Florida Bar found that James's conduct warranted a 91-day suspension rather than a 30-day suspension.

In the Matter of Ryan Patrick Claridge, State Bar No. 20-2214 (Jan. 21, 2022)

FACTS: Arizona lawyer Ryan Claridge was representing Tina Gibbons in a divorce. A trial regarding the petition was held, and all parties appeared through video/audio on GoToMeeting. While Gibbons was being cross-examined by her ex-husband's lawyer, Claridge sent messages to Gibbons using GoToMeeting's chat feature, telling Gibbons how to answer the questions.

VIOLATIONS: Respondent's conduct in this matter violated Arizona Supreme Court Rule 42, specifically:

- 1. ER 3.4(a): "A lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;"
- 2. ER 8.4(c): "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;"
- 3. ER 8.4(d): "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice;"

DISCIPLINE: Suspension of 60 days (effective March 1, 2022) and 2 years' probation upon reinstatement.

B. Ghost Clients

Florian Damaso Purganan

FACTS: While a partner at Hanis Irvine Prothero, Purganan created a Facebook page under the name "Sanidad & Perganan [sic]." The page stated that the firm was located in the Philippines and associated with Purganan's firm in Washington. From 2010 to 2019, Purganan represented at least 150 "ghost clients" without his firm's knowledge. Purganan used Hanis Irvine's resources to handle the ghost client cases, including using the firm's office, documents with the firm's letterhead and a firm-issued email address, and the firm's technology resources.

Purganan initially denied the allegations and attempted to explain that the ghost clients were close family or friends. However, he eventually admitted to the misconduct.

VIOLATION: The ODC determined that Purganan violated Rules of Professional Conduct 8.4(c) by misappropriating funds belonging to Hanis Irvine, performing legal services for outside clients, and retaining legal fees while concealing that he was representing clients and receiving fees.

DISCIPLINE: Purganan was subsequently disbarred (effective December 27, 2021) due to his failure to maintain personal integrity. Under the ABA's "Standards for Imposing Lawyer Sanctions," disbarment is generally appropriate when "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

C. Responding to Negative Online Reviews

Model Rule 1.6(a), adopted in some form in all U.S. jurisdictions, bars disclosing "information relating to the representation of a client."

The "self-defense" exception covers three situations that can entitle you to disclose otherwiseconfidential information:

- 1. establishing a claim or defense in a lawyer-client controversy;
- 2. establishing a defense to a criminal or civil charge based on conduct in which the client was involved; and
- 3. responding to allegations in "any proceeding concerning the lawyer's representation of the client."

In its latest Opinion 496, however, the ABA flatly rules out applying these exceptions to permit any degree of confidential information disclosure in response to online reviews: "A negative online review, alone, does not meet the requirements of permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response that discloses information

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relating to a client's representation or that would lead to discovery of confidential information would exceed any disclosure permitted under the Rule."

Instead of firing back and risking your license, the ABA has several good recommendations on what you can do:

- 1. consider not responding after all, doing so "may draw more attention to [the bad review] and invite further response from an already unhappy critic."
- 2. ask the website or search engine to take down the adverse information;
- 3. if you do choose to respond online, don't disclose "information that relates to a client matter, or that could reasonably lead to the discovery of confidential information by another."
- 4. post an invitation for your critic to contact you privately to resolve the matter;
- 5. post a response saying that "professional considerations preclude a response."

State ex rel. Oklahoma Bar Association v. Pistotnik, 477 P.3d 376 (Okla. 2020)

FACTS: Bradley Pistotnik hired a web developer, David Dorsett, to build a website for his newly formed law firm. After discovering an article on RipoffReport.com describing Pistotnik as a criminal, Pistotnik asked Dorsett how to "get rid of it." Dorsett said he had a friend who could "de-index" negative reviews. Six days later, "Dorsett sent extortionate threats and initiated a flood of emails to the servers of Ripoff Report, Leagle, and [Ripoff Report's law firm]," which caused their communications and data to be inaccessible.

During a phone call with the attorneys representing Ripoff Report, Pistotnik "denied having any knowledge or involvement and falsely stated that he had never asked or hired anyone to help him with reputation management." When the attorneys stated that they would be turning the matter over to the FBI, Pistotnik blamed his brother and again reemphasized that he had not hired anyone.

After that phone call, Pistotnik called Dorsett, who confirmed that he attacked the entities above. The negative review was successfully removed, and Dorsett sent an email detailing his methods and confirming the removal. Four days later, Dorsett sent an invoice, and Pistotnik paid.

Pistotnik only went to the FBI to report Dorsett once he learned that Dorsett published the negative articles in a larger scheme to extort Pistotnik and three others. Pistotnik initially painted himself as a victim and evaded investigation.

CRIMINAL CHARGE: Once the FBI learned of the full extent of the scheme, Pistotnik was charged and pleaded guilty to three counts of Accessory After the Fact, in violation of 18 U.S.C. § 3.

DISCIPLINE: Suspended for two years and one day.

REASONING: He carried out these misrepresentations in protection of his own interests to the detriment of others. Respondent's crimes involved fraudulent conduct as a litigant and in many ways in his professional capacity as a lawyer.

It is professional misconduct for an attorney to "commit a criminal act which reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule 8.4(b), Oklahoma Rules of Professional Conduct ("ORPC"), 5 O.S.2011, ch.1, app. 3-A. It is also professional misconduct to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." ORPC, Rule 8.4(c). A misrepresentation under Rule 8.4(c) of the ORPC requires clear and convincing evidence that the lawyer had an underlying bad intent and made the misrepresentation for the purpose of deceiving.

In the Matter of Brian LeBon Calpin,

FACTS: Calpin represented Angela Carroll in a child custody dispute in 2016. Displeased with Calpin's service, Carroll retained another attorney in summer 2017. She then left a poor review of his services on websites. Calpin subsequently left the following nasty review of Carroll's massage business on Yelp:

"Well, Angee is a convicted felon for fleeing the state with children. A wonderful parent. Additionally, she has been convicted of shoplifting from a supermarket. Hide your wallets well during a massage. Oops, almost forgot about the DWI conviction. Well, maybe a couple of beers during the massage would be nice."

VIOLATION: Court found a violation of RPC 1.9, which states that:

- 1. (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known.

DISCIPLINE: One-year suspension.

REASONING: In this case, the complaint alleged that the information respondent divulged about Carroll's convictions of interference of custody, shoplifting, and DUI, although publicly available, was not generally known. Respondent provided no evidence to the contrary.

Bar Counsel v. Frank Arthur Smith, III

FACTS: Smith represented a grandmother who was seeking guardianship of her grandson. After a hearing in September 2015, Smith posted the following message on Facebook: "I am back in the Boston office after appearing in Berkshire Juvenile Court in Pittsfield on behalf of a grandmother who was seeking guardianship of her six year old grandson and was opposed by DCF yesterday. Next date-10/23."

One friend, an attorney, asked the grounds for opposing. Smith responded: "GM [grandmother] will not be able to 'control' her daughter, the biological mother, and DCF has 'concerns.' Unspecific."

Another friend, a non-attorney, asked: "So, what's the preference ... Foster care? What am I missing here"? Smith answered, "The grandson is in his fourth placement in foster care since his removal from GM [grandmother]'s residence in late July. I will discover what DCF is doing or not doing as to why DCF opposes the GM [grandmother] as guardian. More to come."

When the grandmother confronted Smith about this message, he initially denied discussing their communications and said his post was limited to "from where [he] was returning and DCF's position only."

Rule 1.6(a) of the Massachusetts Rules of Professional Conduct prohibits lawyers from "reveal[ing] confidential information relating to the representation of a client ..." Comment [3A] to the rule defines "confidential information" as "information obtained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorneyclient privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the lawyer has agreed to keep confidential." With relevance to this case, Comment [3A] further explains that, "'[c]onfidential information' does not ordinarily include ... information that is generally known in the local community or the trade, field or profession to which the information relates."

DISCIPLINE: Public reprimand

REASONING: "By posting on Facebook, the respondent potentially disclosed his client's information to anyone with an internet connection or cell phone service. The post is no different than publishing the facts in a newspaper or broadcasting them on television . . . The respondent's conduct ignored not only the basic tenets of Rule 1.6, but the basic confidentiality requirements that all attorneys who handle these sort of child custody and protection matters should honor."

"The information revealed by Smith on Facebook falls into the second category of Comment [3A]: likely to be embarrassing or detrimental to the client if disclosed."

D. Sexual Misconduct

ABA Model Rule 1.8(j) states: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced."

The Louisiana Rules of Professional Conduct do not expressly prohibit sexual relations with a client, but the Louisiana Supreme Court has sanctioned lawyers for this conduct under other rules.

"For example, in the matter of *In re Fuerst*, No. 2014-B-0647 (La. Dec. 9, 2014), the court found that Fuerst violated Rules 1.7(a)(2) (in which a conflict of interest exists because of a personal interest of the lawyer) and 8.4(d) (conduct prejudicial to the administration of justice) because he had a sexual relationship with a client ... The court held that lawyers are not prohibited from engaging in consensual sexual relationships with former and prospective clients—but cannot engage in such relationships with present clients."

Louisiana lawyers could be sanctioned under Louisiana Rules of Professional Conduct 8.4 for having sex with a <u>former</u> client. "Rule 8.4(d) typically applies to 'litigation-related misconduct,' ... [but it] also reaches conduct that is uncivil, undignified, or unprofessional, regardless of whether it is directly connected to a legal proceeding." See *In re Downing*, 930 So. 2d 897, 904 n.5 (La. 2006). "For example, a lawyer received a thirty-day suspension for disrupting a court proceeding by 'using vulgarities in the courtroom.' See *In re Sanford*, 214 So. 3d 841 (La. 2017). Another lawyer received a public reprimand after raising his fist and threatening to punch the opposing counsel. *In re Spears*, 290 So. 3d 645 (La. 2020) ... Considering this, Rule 8.4 could be employed to discipline a lawyer for sending unwelcome and 'extremely graphic' emails to a former client."

Greg Smith, Sexual Misconduct by Louisiana Lawyers, 81 LA. L. REV. (2021)

The ABA adopted Model Rule 1.8(j) in 2002, and so have many other jurisdictions. Louisiana still has not adopted the rule, but sexually related behavior is still disciplined under other rules.

Criminal Sexual Misconduct

Several Louisiana lawyers have been disciplined for sexually related criminal acts under Rule 8.4(b), which "allows for the imposition of professional discipline based on criminal acts by lawyers."

Noncriminal Sexual Misconduct

• The Louisiana Supreme Court has disciplined an attorney for sexual harassment and attempting to have sexual relations with a client, concluding that the attorney violated

Ethics

Rules 1.7 (conflict of interest), 2.1 (impairment of lawyer's professional judgment), and 8.4 (criminal act).

- If 1.8(j) had been adopted, outcome likely would have been the same, although the Court may have concluded that the attorney attempted to violate 1.8(j) and thereby violated 8.4(a), "which prohibits lawyers from attempting to violate one of the Rules."
- Consensual sexual relationships with clients
 - "...[T]he operative 'rule' in Louisiana is that lawyers who engage in consensual sexual relationships with clients thereby engage in a conflict of interest [under Rule 1.7]. That is the same outcome that we would expect to see from an application of Model Rule 1.8(j), which is itself a conflict of interest rule."
 - *In re Fuerst* concluded that the sexual relationship resulted in a conflict of interest that was imputed to other lawyers at his firm.
 - Smith argues that this conclusion is "dubious" because of the exception in 1.10(a) that states: "unless the prohibition is based on a <u>personal interest</u> of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

Should Louisiana Reconsider Adoption of Model Rule 1.8(j)?

- Rule 1.8(j) likely would not have made a difference in the outcome of many of the cases.
- Arguments in Favor of Adoption:
 - Louisiana cases do not deal w/ all issues relating to lawyer sexual misconduct
 - Ex. does LA lawyer have conflict in representing own spouse or person w/ whom lawyer has sexual relationship with?
 - Rule 1.8(j) expressly excludes these pre-existing relationships
 - There is no clear distinction between consensual sexual relationships that precede the representation and consensual sexual relationships that follow it
 - Precludes a potential informed-consent argument
 - Lawyer might attempt to show that he obtained client's informed consent before engaging in sexual relations (as conflict of interest waiver provision under 1.7(b))
 - Under the rule, the conflict of interest would be non-consentable
 - Might deter lawyers from engaging in sexual relations w/ clients
 - Step in the direction of legal uniformity
- Arguments Against Adoption:
 - Louisiana Supreme Court has been able to discipline lawyers anyway without the rule, and 1.8(j) wouldn't have even applied in some circumstances
 - Allowing representation of person w/ whom lawyer has preexisting sexual relationship could actually create a conflict of interest under 1.7, or an impairment of professional judgment under Rule 2.1
 - 1.8(j) could make client standards misleading and less apparent
 - Might be bad to preclude an informed-consent argument
 - Many conflicts can be resolved with informed consent, and different circumstances may justify different outcomes
 - Other rules like 1.7 already cover certain situations

- Rule 1.8(j) does not define "sexual relations"
 - Unclear exactly what type of conduct is prohibited, just sexual intercourse or does it include sexting?
- Adoption of the Rule will not send a message to lawyers that sexual misconduct will be tolerated
 - The cases and subsequent disciplinary outcomes should alert Louisiana lawyers to the dangers
- Uniformity is not likely to be achieved in this area of the law, and LA is not the only state to not have adopted 1.8(j)
- State Variations
 - Some adopt 1.8(j) but add provisions to it
 - Some adopt a per se ban that is different from 1.8(j)
 - Some adopt a rule that is not a per se ban but instead prohibits sexual conduct by lawyers that causes particular harms

Conclusion

- If court chose to adopt a per se ban, could devise a rule that includes:
 - 0 (1) a definition of "sexual relations";
 - (2) a provision on the application of the rule when the client is an organization, like a corporation; and
 - (3) a provision making it clear that, when a lawyer takes on the representation of a person with whom the lawyer has a pre-existing sexual relationship, the lawyer is still subject to the basic conflict of interest rule on personal interests of the lawyer that materially impair the representation of the client
- Could adopt a rule without a per se ban that focuses on sexual conduct that exploits clients, adversely affects the client's interests, or adversely affects the lawyer-client relationship
- "... [B]ased on the most recent cases involving consensual sexual relationships with clients, including consent discipline cases, it appears that the operative rule in Louisiana is that a lawyer who engages in sexual relations with an existing client will be found to have engaged in professional misconduct."

In the Matter of Kevin Michael Regan, D-75-085546 (N.J. 2021)

FACTS: Regan represented a woman in a divorce case. After the representation ended, he sent her a graphic sexual email offering to perform oral sex on her. Regan claimed that his client was being "sexually aggressive" and made comments that were "sexually suggestive." He said he was simply "follow[ing] up on what [he] perceived to have been a history of her making advances."

The Disciplinary Board rejected Regan's explanation and found his conduct to be offensive and reckless. They recommended censure for violations of New Jersey RPC 3.2 and 8.4(g).

VIOLATIONS:

- 1. 3.2: "A lawyer shall ... treat with courtesy and consideration all persons involved in the legal process."
- 2. 8.4(g): "It is professional misconduct for a lawyer to: (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm."

DISCIPLINE: The Supreme Court of New Jersey censured Regan.

REASONING: Regan intended to cause the client harm by sending her a derogatory email, which constituted sexual harassment, a form of gender discrimination.

E. Recording Phone Calls

A Louisiana lawyer may record a phone call with a potential witness if at least one of the parties has given prior consent to the recording.

The ABA has issued a formal opinion and concluded: "Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation." There are no material differences between the potentially applicable ABA Model Rules and Louisiana Rules in this regard. Therefore, the conclusion is the same under the Louisiana Rules of Professional Conduct.

Louisiana Revised Statutes sec. 15:1303(C)(4) provides that it is "not unlawful" to record a phone call when "such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception."

Therefore, a Louisiana lawyer does not violate Louisiana Rule 8.4(b) by recording the conversation.

La. Rule 8.4(b): "It is professional misconduct for a lawyer to: (b) commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;"

III. CRIMINAL CHARGES

A. College Admissions Scandal

In the Matter of Gordon R. Caplan, Motion No. 2020-03510

FACTS: In June 2018, Caplan was introduced to a college counselor, Rick Singer, at the tennis academy that his daughter attended. Singer proposed a \$75,000 scheme to Caplan in order to manipulate the college admissions process, which included having his daughter take tests to get her extra time on the ACT test and have Singer's specific proctors correct her answers.

In May 2019, Caplan pleaded guilty and was convicted of conspiracy to commit mail fraud and honest services mail fraud in violation of 18 U.S.C. § 1349, which provides that: "Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

*Note: Under New York Judiciary Law Section 90(4), committing a state law felony or a federal crime that "would constitute a felony" in New York automatically triggers a New York lawyer's disbarment. Here, Caplan was pleading guilty in Massachusetts to mail fraud conspiracy, which has no direct, or "mirror image," analog to a New York state felony.

SENTENCE: Caplan was sentenced to 1 month in prison, 1 year of supervised release, 250 hours of community service, and a \$50,000 fine.

In November 2019, Caplan was suspended from the practice of law and, within 90 days of his release from prison, directed to show cause why a final order of suspension should not be granted. In July 2020, a hearing was held in which a Referee heard evidence from both Caplan and the AGC. Caplan advocated for a 1-year suspension, retroactive to date of Court's interim suspension. AGC advocated for a 2-year suspension, retroactive to date of Court's interim suspension. Referee recommended AGC's recommendation.

DISCIPLINE: The Court confirmed the Referee's report which recommended a 2-year suspension, retroactive to the date of the Court's interim suspension which was effective November 7, 2021.

REASONING: Caplan's actions were focused on not getting caught, and he continued to participate in the scheme, despite having opportunities to walk away.

UPDATE: As of February 15, 2022, Caplan is reinstated as an attorney in New York.

B. Extortion and Fraud

United States v. Layfield, 2:18-cr-00124 (Ca. 2022)

FACTS: In 2016, Philip James Layfield was representing a woman, J.N., who was injured in a car accident. He settled the case for \$3.9 million in August 2016. Between August 2016 and February 2017, J.N. repeatedly contacted Layfield to ask when she would receive the money, and Layfield kept giving her excuses, saying it was tied up by medical liens. In March 2017, Layfield mailed J.N. a \$25,000 "advance" against J.N.'s portion of the settlement proceeds, which was \$2,340,000. In June 2017, J.N. hired a new lawyer, Artinian, and had no further contact with Layfield.

Layfield also stole settlement money from other clients, and he also failed to file a federal income tax return for the year 2016.

VIOLATIONS:

- Rule 4-100(A): "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account...'"
- Rule 4-100(B)(3): "A member shall: (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar."
- Rule 4-100(B)(4): "A member shall: (4) promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

DISCIPLINE: Disbarred as of October 27, 2018

CRIMINAL CHARGES FILED: February 23, 2018

UPDATE: Convicted of wire fraud and mail fraud on February 17, 2022. Sentenced to 144 months in prison.

United States v. Avenatti, 432 F. Supp. 3d 354 (S.D.N.Y. 2020)

FACTS: Michael Avenatti attempted to extort Nike for his own personal gain and defrauded his client. Avenatti told Nike that he had evidence of company employee misconduct in the recruitment of college basketball players. Specifically, Avenatti claimed that he had evidence of employees authorizing and funding payments to families of top high school basketball players. Avenatti then threatened to hold a press conference and expose his claims to the public if Nike did not agree to his conditions. The press conference was to take place on the eve of Nike's quarterly earnings call and the start of NCAA tournament, which would negatively impact Nike's market value.

Avenatti said he would not hold the press conference if Nike either: (1) Paid \$1.5 million to his client and hired Avenatti to conduct an internal investigation (minimum payment between \$15-25 million), or (2) Paid Avenatti \$22.5 million outright to resolve the potential claims of his client and buy Avenatti's silence. During subsequent phone calls and meetings, Avenatti repeatedly threatened Nike's lawyers and demanded to be paid at least \$10 million for the internal investigation.

CHARGES: Avenatti was charged with violations of 18 U.S.C. §§ 371, 875(d), 1951, and 2.

- 1. Count one: conspiracy to transmit interstate communications with intent to extort
 - a. 18 U.S.C. § 875(d) provides: "Whoever, <u>with intent to extort</u> from any person, firm, association, or corporation, <u>any money or other thing of value</u>, <u>transmits in</u> <u>interstate or foreign commerce any communication containing any threat to injure</u> <u>the property or reputation of the addressee</u> or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both."
 - b. 18 U.S.C. § 371: Conspiracy to commit offense or to defraud United States
 - i. "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
 - ii. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."
- 2. Count two: conspiracy to commit extortion
 - a. 18 U.S.C. § 1951(a) provides: "Whoever in any way or degree <u>obstructs</u>, <u>delays</u>, <u>or affects commerce or the movement of any article</u> or commodity <u>in commerce</u>, by robbery or <u>extortion or attempts or conspires so to do</u>, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both."

- 3. Count three: transmission of interstate communications with intent to extort a. 18 U.S.C. § 875(d) and 2
- 4. Count four: extortion
 - a. 18 U.S.C. § 1951 and 2

OUTCOME: Avenatti was convicted on all 3 counts (18 U.S.C. §§ 371, 875(d), and 1951), including attempted extortion and honest services fraud. He was sentenced to 30 months in prison and sentenced to 3 years of supervised release.

REASONING: Avenatti "hijacked his client's claims and...used those claims to further his own agenda, which was to extort millions of dollars from Nike for himself." Avenatti threatened Nike with both economic and reputational harm, all while defrauding and mistreating his own client.

State Bar of California Complaint Against Avenatti (PENDING)

Avenatti was suspended from the practice of law for causing substantial harm to the public, based on allegations and evidence that he misappropriated \$839,390.27 of his client's funds over one year.

FACTS: In July 2014, Barela entered into a fee agreement with Avenatti and his law firm, in which Avenatti was to receive a contingency fee of 40% of any settlement recovery obtained. In December 2017, Avenatti and opposing counsel (Sheikh) settled for \$1.9 million, in which \$1.6 million was to be paid to Barela at once in January 2018, and then three subsequent payments of \$100,000 each following year in January (2019, 2020, and 2021). However, when Avenatti met with Barela, the settlement agreement presented required the settling party to pay in March, and Avenatti reiterated this point.

The settling party deposited the initial \$1.6 million payment into Avenatti's client trust account on January 5, 2018. Avenatti did not inform Barela, nor did he provide Barela with an accounting. Avenatti was entitled to receive \$760,000 as his fees, so Barela was entitled to \$840,000 and Avenatti had to maintain that amount in the client trust account.

Avenatti made withdrawals from the account for his own personal use, without Barela's knowledge or consent. Avenatti "intentionally and dishonestly misappropriated \$839,390.27 entitled to Mr. Barela by disbursing to himself and other third parties nearly the entirety of Mr. Barela's settlement proceeds for his own personal use." By March 14, 2018, the balance in the Barela CTA was \$609.73.

Between March 10, 2018 (when Barela believed the first payment was due) and December 3, 2018, Avenatti repeatedly told Barela that Avenatti had not yet received Barela's funds due to the settling party's refusal to remit the funds. Avenatti also falsely told Barela that he had spoken

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to Sheikh, who said they were "in disbelief" that settling party had not paid (which was completely made up).

When Barela asked about the funds, Avenatti repeatedly concealed the true status of the settlement funds and continued to assure Barela that Avenatti was working to obtain the funds.

Barela repeatedly emailed Avenatti about filing a lawsuit against the settling party for not abiding by the terms of the agreement and making the \$1.6 million payment. Barela repeatedly expressed that his family was struggling financially and that he needed more money.

Avenatti told Barela to let him know when he needed an advance of money and Avenatti would wire money to him. Between April 5, 2018, and November 5, 2018, Avenatti gave Barela a total of 5 "advance" loans totaling \$130,000, to be repaid by Barela from the \$1.6 million settlement installment that Avenatti had already received but continued to conceal.

At the end of 2018, Barela was trying to get a loan of \$100,000 in order to operate his business. When Avenatti learned of this, he convinced Barela to get a loan from HIM instead (knowing that the \$100,000 payment from the settling party was coming in on January 10, 2019).

In November 2018, Barela hired Larson O'Brien, LLC to represent him in collecting the proceeds. His new attorney, Bledsoe, contacted counsel for the settling party. Bledsoe explained that Avenatti told Barela that the \$1.6 million payment was not paid, and that the settlement agreement said it was due March 10, 2018. Sheikh (counsel for settling party) said that payment was actually due in January and it was paid. Sheik later sent the actual settlement agreement to Bledsoe.

In January 2019, Bledsoe submitted this State Bar complaint on behalf of Barela against Avenatti.

VIOLATIONS (According to California State Bar):

- Former Ca. RPC 4-100(B)(1): "A member shall: (1) promptly notify a client of the receipt of the client's funds, securities, or other properties."
 - Failed to notify Barela of the January payment made by settling party
- Former Ca. RPC 4-100(A): "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account..."
 - Failed to maintain \$840,000 on behalf of Barela in the Barela CTA
- Former Ca. RPC 4-100(B)(3) + Current Ca. RPC 1.15(d)(4)
 - 4-100(B)(3): "A member shall: (3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar."
 - 1.15(d)(4): "A lawyer shall: (4) promptly account in writing to the client or other person for whom the lawyer holds funds or property;"

- Failed to render an appropriate accounting, despite Barela's requests
- Former Ca. RPC 4-100(B)(3) + Current Ca. RPC 1.15(d)(7)
 - 1.15(d)(7): "A lawyer shall: (7) promptly distribute, as requested by the client or other person, any undisputed funds or property in the possession of the lawyer or law firm that the client or other person is entitled to receive."
 - Failed to pay Barela his entire portion of the initial \$1.6 million settlement payment
- Current Ca. RPC 1.16(e)(1): "Upon the termination of a representation for any reason:
 - (1) subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings,* exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably* necessary to the client's representation, whether the client has paid for them or not; and"
 - Failed to release Barela's file to Barela, despite Barela's requests

Since there is no pending disciplinary proceeding against Avenatti, the State Bar has moved the Court for an order enrolling Avenatti as an involuntary inactive member of the State Bar. In order to be successful under the Business and Professions Code Section 6007(c)(2), the State Bar must demonstrate with clear and convincing evidence that:

- 1. Avenatti has caused, and is causing, substantial harm to Barela;
- 2. There is a reasonable probability that the State Bar will prevail on the merits at a disciplinary trial; and
- 3. There is a reasonable probability that Avenatti will be disbarred for intentionally misappropriating approximately \$840,000 belonging to Barela.

CONCLUSION: The California State Bar Court concluded that the evidence clearly and convincingly established that each factor above was proven. The State Bar respectfully submitted that an Order enrolling Avenatti as an involuntary inactive member of the State Bar is therefore warranted.

IV. Election Fraud Claims

In the Matter of Rudolph W. Giuliani,

Motion No. 2021-00491 (May 3, 2021)

FACTS: Giuliani made many false and misleading statements to cast doubt on the reliability of the results of the 2020 presidential election.

Relevant Rules of Professional Conduct:

- Rule 4.1 provides that: "In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person."
- Rule 8.4 provides that: "A lawyer or law firm shall not: ... (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, ..."
- Rule 3.3 provides that: "(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal"

1. Giuliani stated that in the Commonwealth of Pennsylvania, more absentee ballots came in during the election than were sent out before the election. The factual "proof" he relied on was that although Pennsylvania sent out only 1,823,148 absentee ballots before the election, 2,589,242 absentee ballots were counted in the election. However, the actual numbers were 3.08 million absentee ballots were mailed out before the election, and 2.5 million were actually counted. Despite this, Giuliani repeatedly asserted his false claims.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

2. On November 17, 2020, Giuliani appeared as the attorney for plaintiff in *Donald J. Trump for President, Inc. v. Boockvar* (502 F Supp 3d 899, affd 830 Fed Appx 377 [3d Cir 2020]). Giuliani repeatedly asserted that plaintiff was pursuing a fraud claim when it was not; the only remaining claim was an equal protection claim. The fraud claim had been voluntarily withdrawn by plaintiff when they served the amended complaint. Giuliani repeatedly claimed allegations of "widespread, nationwide voter fraud." Giuliani did not admit the true status of the case until he was pressed to do so by the court, which created confusion.

 \rightarrow The above statements violate Rules of Professional Conduct 8.4(c), 3.3, and 4.1.

3. Giuliani repeatedly asserted that "dead" people voted in Philadelphia, using numbers from 8,021 to 30,000. He failed to provide any evidence to support the varying and inconsistent numbers. He said that he was investigating the claim, but he provided no report or results of any investigation.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

4. Giuliani knowingly made statements about the Georgia presidential election results to cast doubt on the accuracy of the vote. He claimed that Dominion Voting Systems Inc.'s voting machines manipulated vote tallies, but Georgia had completed a hand count of all ballots cast, which "confirmed the results of the election with a zero percent risk limit."

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

5. Giuliani claimed that 65,000 or 66,000 or 165,000 underage voters illegally voted in the Georgia 2020 election. Georgia investigated the claim and found that that were zero underage voters. Giuliani claimed that he reasonably relied on "expert" affidavits, which were not provided to the Court. No source or data information could substantiate Giuliani's claims.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

6. Giuliani claimed that more than 2,500 Georgia felons voted illegally. Georgia found 74 potential felony voters, who were then investigated. He claimed to rely on the same affidavit that provided information on underage voters, and again he could not produce this affidavit.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

7. Giuliani claimed that dead people (from 800-6,000) voted in Georgia during the 2020 presidential election. Georgia refuted this claim and found that there were potentially 2 voters that may have been improperly cast in the name of dead voters.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

8. Giuliani claimed that surveillance footage showed Georgia election officials illegally counting mail-in ballots. However, the version of the video that he showed to the public was not the entire video. When the video is viewed in its entirety, it is clear that there is no secreting and counting of illegal ballots.

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

9. Giuliani claimed that "illegal aliens" voted in Arizona. Despite there being no statewide data on the number of undocumented citizens in the state, Giuliani claimed that there were "'say' five million 'illegal aliens' in Arizona." He claimed that more than 10,000 voted in the election. Later, he said the minimum is 40,000-50,000 but that it is probably more like 250,000. He again changed the number to 32,000. The Court said that the claims are so "wildly divergent and irreconcilable that they all cannot be true at the same time."

 \rightarrow The above statements violate Rules of Professional Conduct 4.1 and 8.4(c).

The Court also found that "all of these acts of misconduct, when considered separately or taken together, also establish that [Giuliani] violated Rules of Professional Conduct 8.4(h) because his conduct adversely reflects on his fitness as a lawyer."

DISCIPLINE: The Court found that Giuliani's professional misconduct constituted an immediate threat to the public and justified suspension until further order of the Court.

Giuliani argued that there was no immediate threat of future harm because he will "exercise personal discipline" and not talk about the matters in public anymore. Further, he argued that he would no longer make statements about the election because the election has concluded. However, the Court disagreed with his ability to exercise self-restraint, as he has shown he is unable to do so by continuing to make false statements even after the AGC brought the application for suspension.

Sidney Powell

Commission for Lawyer Discipline v. Sidney Powell, DC-22-02562 (March 1, 2022)

The Commission for Lawyer Discipline, a standing committee of the State Bar of Texas, filed a disciplinary action against Powell on March 1, 2022.

FACTS: After the presidential election in November 2020, Powell filed multiple federal lawsuits in different jurisdictions alleging election fraud. She "took positions that unreasonably increased the costs ... of the cases and unreasonably delayed resolution of the matters."

Powell violated the following Texas Disciplinary Rules of Professional Conduct:

- 3.01 "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."
- 3.02 "In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter."
- 3.03(a)(1) "A lawyer shall not knowingly: make a false statement of material fact or law to a tribunal."
- 3.03(a)(5) "A lawyer shall not knowingly: offer or use evidence that the lawyer knows to be false."

8.04(a)(3) - "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

King v. Whitmer,

505 F. Supp. 3d 720 (E.D. Mich. 2020)

FACTS: On November 25, 2020, Plaintiffs filed suit against Michigan Governor Whitmer, Michigan Secretary of State Benson, and Michigan Board of State Canvassers. Plaintiffs alleged violations of the Elections and Electors clauses, the Fourteenth Amendment Equal Protection

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Clause, and the Fourteenth Amendment Due Process Clause. Specifically, plaintiffs claimed that Defendants failed to comply with the Michigan Election Code and committed a scheme to manipulate the election to ensure Biden's election. Plaintiffs asserted that their claims were supported by affidavits of eyewitnesses and statistical data from expert witnesses.

The Court denied Plaintiffs' motion for injunctive relief, concluding that their claims were moot and Plaintiffs were unlikely to succeed on the merits of their claims. Plaintiffs failed to provide and explain a reasonable basis for their claims. Defendants thereafter filed motions for sanctions.

1. State Defendants Whitmer and Benson sought sanctions under 28 U.S.C. § 1927.

They argued that "Plaintiffs' counsel unreasonably and vexatiously multiplied the proceedings in this litigation by failing to dismiss the case when their claims became moot, which plainly occurred upon the vote of Michigan's electors on December 14, if not earlier." They also argued that "Plaintiffs' counsel knew or should have known that their legal claims were frivolous, but counsel pursued them nonetheless, even after the Court's opinion concluding that Plaintiffs were unlikely to succeed on the merits of their claims for multiple reasons," which included "the weakness of their legal claims and the lack of factual support."

State Defendants identified three specific allegations not well-grounded in fact:

- 1. "'[T]he absentee voting counts in some counties in Michigan have likely been manipulated by a computer algorithm,' and [] at some time after the 2016 election, software was installed that programmed tabulating machines to 'shift a percentage of absentee ballot votes from Trump to Biden.'"
- 2. "Smartmatic and Dominion were founded by foreign oligarchs and dictators to ensure computerized ballot- stuffing and vote manipulation to whatever level was needed to make certain Venezuelan dictator Hugo Chavez never lost another election."
- 3. "The several spikes cast solely for Biden could easily be produced in the Dominion system by preloading batches of blank ballots in files such as Write-Ins, then casting them all for Biden using the Override Procedure (to cast Write-In ballots) that is available to the operator of the system."

The Court finds that sanctions are warranted under 28 U.S.C. § 1927. Plaintiffs' counsel unreasonably and vexatiously multiplied the proceedings in this case and their arguments to the contrary are unavailing.

REASONING: Plaintiffs conceded that their claims would be moot after December 14, yet they failed to voluntarily dismiss their claims. They continued to pursue their legal claims "even after the Court issued its opinion informing Plaintiffs and their counsel that their legal claims were weak and lacked factual support."

2. The City of Detroit sought sanctions under Rule 11 of the Federal Rules of Civil Procedure.

First, the City argued that Plaintiffs' complaint was filed for an improper purpose. In support of their argument: "(i) the hurdles that previously barred Plaintiffs' success, including Eleventh Amendment immunity, mootness, laches, standing, and the lack of merit as to the claims under the Constitution and state statutory law; (ii) the lack of seriousness and awareness of deficiency evinced by Plaintiffs' failure to serve Defendants before this Court hastened them via its December 1, 2020 text-only order; and (iii) Plaintiffs' counsel's attempt "to use this Court's process to validate their conspiracy theories," "undermin[e] our democracy," and "overturn[] the will of the people" as evinced by statements made by some of Plaintiffs' attorneys."

Second, the City argued that "Plaintiffs' claimed were not well-grounded in law.... because the factual allegations could not support Plaintiffs' claims or the relief they requested."

Court's findings:

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- Plaintiff's claims are frivolous
- Plaintiffs alleged that certain acts or events violated the Michigan Election Code when they did not
- Plaintiffs failed to make any inquiry into whether such acts or events were in fact unlawful
- Plaintiffs' counsel failed to present any evidence to support their allegation of "illegal double voting"
- Plaintiffs' counsel presented affidavits that were based on conjecture, speculation, and guesswork
- Plaintiffs' counsel failed to ask questions of the individuals who submitted affidavits that were central to the factual allegations in the pleadings
- Plaintiffs' counsel attached affidavits to their pleadings that were submitted in two previously filed election-challenge lawsuits without engaging in a reasonable inquiry as to their contents
- Plaintiffs' counsel acted with an improper purpose when affirmatively labeling as an "illegal vote dump" the 100,000 ballots discussed on the news, despite failing to inquire as to the gaps that established the relevant affidavit as nothing more than conjecture

The Court finds that sanctions are warranted under FRCP 11.

HOLDING: "The Court concludes that Plaintiffs' counsel filed this lawsuit in bad faith and for an improper purpose. Further, they presented pleadings that (i) were not "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law" and (ii) contained factual contentions lacking evidentiary support or likely to have evidentiary support. Finally, by failing to voluntarily dismiss this lawsuit on the date Plaintiffs' counsel acknowledged it would be moot and thereby necessitating the filing of motions to dismiss, Plaintiffs' attorneys unreasonably and vexatiously multiplied the proceedings."

"[T]he Court holds that sanctions are warranted under Rule 11, § 1927, and the Court's inherent authority."

SANCTIONS: at least 12 hours of continuing legal education in the subjects of pleading standards (at least 6 hours total) and election law (at least 6 hours total

"[T]he conduct of Plaintiffs' counsel, which also constituted violations of the Michigan Rules of Professional Conduct, *see, e.g.*, MRPC 3.1 and 3.3, calls into question their fitness to practice law. This warrants a referral for investigation and possible suspension or disbarment to the appropriate disciplinary authority for every state bar and federal court in which each attorney is admitted, see Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendment) (explaining that such referrals are available as a sanction for violating the rule); E.D. Mich. LR 83.22(c)(2)."

The City of Detroit was awarded \$153,285.62, and Michigan was awarded \$21,964.75.

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LOUISIANA STATE UNIVERSITY'S 69TH MINERAL LAW INSTITUTE

APRIL 1, 2022

LOUISIANA AND CCS: AN UPDATE

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INTRODUCTION

To meet the demands of a growing world population of over seven billion people, stakeholders must look for opportunities to capitalize on all energy sources in addition to energy-dense hydrocarbon. While finding ways to meet these needs, governments and organizations have set goals to mitigate potential impacts of climate change, some making it a top priority by setting net-zero greenhouse gas ("GHG") emissions goals or potentially advocating for wholesale elimination of GHG emissions to reach those goals. Organizations, public and private, are investigating policies and opportunities to meet energy demands *and* mitigating the impact of GHG emissions on climate. Louisiana has a tremendous opportunity to recognize and capitalize on carbon sequestration to grow its economy and establish itself as a global leader in climate solutions.

Louisiana has a long history with the oil, natural gas, and petrochemical industry. An industry investing billions of dollars into the advancement of innovative solutions and incorporating new technologies with the goal of reducing GHG and other air emissions. Since the risks of climate change are real, the solutions to these risks must also be real. As such, now is the time to work together to develop creative solutions to the climate challenge, solutions that leverage natural areas of strength and present opportunities for economic growth. To meet global energy demands, including an increased demand of petroleum and liquid fuels into the future,¹ market-driven solutions are critical to GHG reductions, including capturing carbon-dioxide ("CO₂") and storing it permanently in the ground. The leading methodology that has emerged is carbon capture and sequestration ("CCS").²

Although the concept first appeared in 2008, the concept of carbon capture and sequestration has gained a lot of traction in Louisiana recently. First, CCS is the most efficient way to reduce CO₂ in the atmosphere on a large scale, especially for certain industrial processes producing GHG emissions that are extremely difficult to abate given existing technology. Second, in early 2021, the U.S. Department of Treasury, Internal Revenue Service (IRS) effectuated³ a credit⁴ for qualified facilities capturing and disposing of CO₂ under Section 45Q of the Internal Revenue Code, hereafter referred to as "45Q". Third, Louisiana is home to interconnected, concentrated stationary sources of GHG emissions in close proximity to existing infrastructure situated to store CO₂ at the lowest cost.⁵ Most importantly, from a geological perspective, Louisiana is attractive for CCS projects because Louisiana has the natural resources in close proximity to these concentrated sources with the available pore space to handle the carbon dioxide produced. Given these critical factors, Louisiana officials have made creating a regulatory framework a priority. Not only is CCS is a solution for eliminating CO₂ emissions via industrial sources, it can also be used in exploration and production and as part of coastal restoration.⁶ CCS provides multiple opportunities in curbing GHG emissions via Louisiana's natural resources.

Louisiana is poised to be a leader in CCS for the nation, if not the world. That is because Louisiana has the infrastructure needed for CCS—it has an ample pipeline network; it has the expertise (oil and gas operators/technical and legal professionals); it has low-cost energy; and it is nearing towards the proper legal framework to allow for the proliferation of CCS projects. Thus, government leaders and oil and gas industry participants have begun to focus more on CCS technology, legislation, and regulation. Louisiana has a

¹ The U.S. Department of Energy's Energy Information Administration ("EIA") forecasts that global consumption of petroleum and liquid fuels will average 100.6 million b/d for all of 2022, up 3.1 million b/d from 2021. The U.S. further forecasts that consumption will *increase by 1.9 million b/d* in 2023 to average 102.6 million b/d. It should be noted that economic forecasts in this outlook were completed before Russia's invasion of Ukraine. The outlook for economic growth and oil consumption in Russia and surrounding countries is highly uncertain. Oil consumption will depend on how economic activity and travel respond to recent and any potential future events and sanctions. (available at: <u>https://www.eia.gov/outlooks/steo/report/global_oil.php</u>, last visited March 16, 2022).

² This process is also sometimes referred to as CCUS—Carbon Capture, Utilization, and Sequestration. "CCUS" refers mainly to enhanced oil recovery ("EOR"), where carbon dioxide is captured and injected into oil & gas formations where production has slowed down. The CO₂ is injected to boost or production from those formations. CCS, on the other hand, generally refers to capturing carbon dioxide and placing it in a well in the ground in perpetuity. ³ The regulations became effective on January 13, 2021.

⁴ See 26 U.S.C. § 45Q(d)(1).

⁵ To store CO_2 , it must be in its purist form with all rogue particulates removed. With the interconnected, sophisticated network of petrochemical infrastructure in Louisiana, the process of purifying CO_2 falls into existing work streams. Specifically, the process of liquifying natural gas or making ammonia, creates a pure CO_2 stream. Thus, the marginal cost to sequester CO_2 is at its lowest point at companies with profit-making work-flows creating pure CO_2 as a byproduct. Then, combining this with 45Q, the most cost-effective states to attract capital investment for CCS include but not limited to Louisiana, Oklahoma, and Texas.

 $^{^{6}}$ When considering large-scale, ongoing coastal restoration efforts, land-based sequestration represents an area for potential synergy. All coastal restoration, reforestation, and wetlands restoration require the introduction and cultivation of various plant species. Inherently, plants sequester CO₂ throughout their lifecycle, so Louisiana's Coastal Protection and Restoration Authority can evaluate future restoration projects to maximize the amount of CO₂ sequestered.

tremendous opportunity to lead the way globally in the CCS industry by leveraging our workforce, geology, and industrial infrastructure to form one or more major CCS hubs within the state. These hubs would fit into a broader, national (or even global) hub-and-cluster carbon infrastructure model. More specifically, both enhanced recovery and geologic storage projects appear to be good, natural fits for Louisiana's geology because Louisiana has numerous geological wells that can be used for CO₂ storage.⁷ Louisiana also has been home to several enhanced recovery projects, and it is currently poised to host several geologic storage projects in the coming years. In fact, the Louisiana Department of Natural Resources ("LDNR") recently completed its final rulemaking process, which will provide for new regulations and a more robust legal framework relating to long-term geologic storage in Class VI wells.⁸ Hence, estimates indicate that Louisiana will have as much as 2.3 trillion tons worth of storage resources; ranking Louisiana second for CO₂ storage potential in the United States with Texas being the only state estimated to hold more storage potential.

Louisiana, in an effort to move forward with CCS projects, has undertaken major legislative steps over the last decade to promote CCS project implementation and to create an appropriate legal framework. In 2008, the Louisiana Legislature passed Act 315, which empowered the Commissioner of Conservation ("Commissioner") to approve subsurface storage of CO₂ and authorized the Louisiana State Mineral and Energy Board to lease state-owned property for CO₂ geologic storage.⁹ The legislature subsequently enacted Louisiana's Geologic Sequestration of Carbon Dioxide Act ("La. GS Act") (Act 517 of 2009) in 2009, which created a comprehensive legal framework governing geologic storage in Louisiana.¹⁰ Louisiana joined the Governor's Partnership for Carbon Capture in 2018 and has worked to promote CCS initiatives through the State Carbon Capture Work Group and its partners. Louisiana also is one of the most active states participating in the Carbon Capture Coalition. In 2019, Act 297 sought to change Louisiana's statutory authority to match federal regulatory requirements more closely.¹¹ In 2020, Act 61 revised several portions of La. GS Act, which among other things separated CO₂ pipelines from the injection portion of a geologic storage facilities for regulatory purposes, and it set forth certain parameters with respect to expropriation.¹²

Governor John Bel Edwards recently created the Climate Initiatives Task Force¹³ to develop a Climate Action Plan for Louisiana. The final recommendations of the Task Force were released in February of 2022, which included CCS as a recommendation under multiple action items.¹⁴ To reach this goal, Louisiana is also working to secure "primacy" (primary enforcement authority) from the EPA for regulation of injection wells used for geologic storage (Class VI wells). Louisiana's application for primacy has been submitted to the EPA and it is expected that approval will be received sometime in 2022.

This memorandum¹⁵ will address the status of Louisiana's application for primacy that is currently pending with the EPA. It will also discuss the current regulatory/legal framework, including potential permitting requirements and, separately, expropriation factors under Act 61, for future CCS projects in Louisiana. Finally, it will examine potential risk factors associated with CCS projects and analyze how environmental justice will be incorporated into CCS projects on a going forward basis.

⁷ It should be noted that carbon dioxide is defined more broadly under both federal and Louisiana law. *See, e.g.*, Credit for Carbon Oxide Sequestration, 26 U.S.C. § 45Q(c)(1) (includes other carbon oxides); EPA Criteria and Standards Applicable to Class VI Wells, 40 C.F.R. § 146.81(d) (carbon dioxide streams include incidental associated substances and substances added to the stream to enable or improve the injection process); and the Louisiana Geologic Sequestration of Carbon Dioxide Act, La. R.S. 30:1103 (includes derivative and mixtures of carbon dioxide); *see also* David Dismukes, "Integrated CCS In The Louisiana Chemical Corridor," Louisiana State University, Carbon Storage and Oil and Natural Gas Technologies Review Meeting, Pittsburgh, PA (Aug. 2017).

⁸ See La. Rev. Stat. 30:1101 et seq.; see also La. Admin. Code Title 43:XVII, Chapter 6, Statewide Order No. 29-N-6 for Class VI wells (1/20/2021). These rules provide a framework for a Class VI well underground injection control program in Louisiana.

⁹ See Acts 2008, No. 315 (available at <u>https://legis.la.gov/Legis/ViewDocument.aspx?d=499939</u>, last visited March 21, 2022).

¹⁰ See Acts 2009, No. 517 (available at <u>https://legis.la.gov/Legis/ViewDocument.aspx?d=668800</u>, last visited March 21, 2022).

¹¹ See Acts 2019, No. 297 (available at <u>https://legis.la.gov/Legis/ViewDocument.aspx?d=1144227</u>, last visited March 21, 2022).

¹² See Acts 2020, No. 61 (available at https://legis.la.gov/Legis/ViewDocument.aspx?d=1180294, last visited March 21, 2022).

¹³ See Exec. Order No. JBE 2020-18 (2020).

¹⁴ Louisiana Climate Action Plan (available at: <u>https://gov.louisiana.gov/assets/docs/CCI-Task-force/CAP/Climate Action Plan FINAL 3.pdf</u>, last visited on March 20, 2022).

¹⁵ It is important to note that CCS represents a very new and emerging area of the law. The legal and regulatory landscape is changing, and many areas of the law have not yet been addressed by law or operational feasibility. As a result, this memorandum provides a current overview of the state of the law in Louisiana.

A. Current Legal Framework – A Regulatory and Permitting Outlook

1. Primacy – The Status of Louisiana's Application

The threshold issue that must be resolved before Louisiana regulators and businesses can begin to actually sequester CO₂ in the ground in Louisiana is "primacy." Primacy refers to a state's ability to regulate, administer, permit, enforce, and govern the wells located in its state with minimal interference or oversight from the EPA. The main purpose of primacy is to give a state the ability to monitor, and to be stewards of, its own resources--here, Class VI wells (deep geologic injection wells for carbon sequestration). It makes sense that a state would be granted the ability to do these regulatory functions because a state should know best what natural resources it has and how those natural resources should be granted primacy over its own wells because the state regulators usually maintain direct relationships with businesses operating in a state. Thus, at the current time, the granting of primacy to the State of Louisiana by the EPA remains a primary focus of CCS proponents in the State of Louisiana.

Louisiana submitted its application for primacy on May 13, 2021¹⁶, pursuant to Section 1422 of the federal Safe Water Drinking Act (see Pub. L. 93-523 and codified at 42 U.S.C. §§ 300f *et seq*.). At present, Louisiana anticipates that its application will likely be granted sometime in 2022. Right now, only North Dakota and Wyoming have been granted primacy over Class VI wells. In April 1982, the EPA granted Louisiana primacy over its Class I, II, III, IV, and V wells. Class VI wells represent a category of wells created by the EPA in 2010 specifically for carbon capture and sequestration. In anticipation of filing its primacy application and in accordance with the provisions of Louisiana's Administrative Procedure Act, La. Rev. Stat. §§ 49:950 *et seq.*, and through the power delegated under the laws of the State of Louisiana, the Department of Natural Resources, Office of Conservation adopted the Statewide Order No. 29-N-6 (La. Admin. Code 43:XVII Subpart 6, Chapter 6) ("Class VI program") to facilitate the permitting, siting, construction, operation, monitoring, and site closure of Class VI injection wells used to inject carbon dioxide for purposes of geologic sequestration.

2. The Importance of Underground Injection Control at the Federal and State Levels

Perhaps the most significant environmental regulation directly pertaining to both carbon enhanced recovery and geologic storage is compliance with the UIC program of the federal Safe Water Drinking Act ("SWDA"). As discussed below, this federal program envisions state, territorial, and tribal¹⁷ authorities carrying out the purpose of the federal UIC program and directly regulating underground injection within their territorial boundaries. Enhanced recovery (Class II wells) and geologic storage (Class VI wells) have different requirements and injection wells used for each are classified as being subject to different regulatory regimes. Permitting of these wells can be a major undertaking and the length of time required to receive permit authorization is a concern, especially due to the January 1, 2026 deadline to begin construction of qualified facilities in order to benefit from the 45Q tax credits.¹⁸ This section will focus on Class VI wells—it will summarize the requirements applicable to this classification of wells, highlight certain portions of these requirements, explain the process by which Louisiana can obtain primacy over its Class VI wells, discuss the timing for obtaining primacy approval, and provide pointers for companies receiving permits to construct/permits to inject.

The primary purpose behind the UIC program is "to prevent underground injection which endangers drinking water sources."¹⁹ Under the SDWA, it defines "underground injection" as "the subsurface emplacement of fluids by well injection." Excluded from this definition are most hydraulic fracturing operations related to oil, gas, or geothermal production activities, as well as underground injection of hydrocarbons which are not liquid

¹⁶ See "Class VI USEPA Primacy Application – Underground Injection Control Program" by State of Louisiana – Department of Natural Resources, submitted May 13, 2021 (available at: <u>http://www.dnr.louisiana.gov/assets/OC/im_div/uic_sec/ClassVIPrimacyApplicationstamped.pdf</u>, last visited March 10, 2022) ("Primacy Application").

¹⁷ The remainder of this section concerns state and federal regulation under UIC, but it should be noted that there are four federally recognized Native Tribes whose lands are geographically located within Louisiana. These tribes are: Chitimacha Tribe of Louisiana, Coushatta Tribe of Louisiana, Jena Band of Choctaw, and Tunica-Biloxi Tribe of Louisiana. A full list of both federally and state recognized Native Tribes can be found at the following web page: <u>https://gov.louisiana.gov/assets/Programs/IndianAffairs/LouisianaTribes.pdf</u>.

¹⁸ See 26 U.S.C. § 45Q(d)(1).

¹⁹ See 42 U.S.C. § 300h(b).

at standard temperature and pressure for purposes of storage.²⁰ The program, which is overseen by the EPA, provides for state governments taking Primary Enforcement Authority in protecting underground sources of drinking water from underground injection located within their territorial boundaries. The SDWA mandated EPA rulemaking to provide minimum standards for state UIC programs to be granted primacy, containing "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources."²¹ At a minimum, state underground injection programs must meet certain requirements in order to be approved by the EPA, such as prohibiting underground injection within the state not authorized by a permit or by rule and that such permits only be granted (or the rules only authorize injection) when the state is satisfied that the proposed underground injection will not endanger drinking water sources.²² This approval of a state UIC program by the EPA is commonly referred to as the "granting" of primacy. More specific requirements for a state program to be granted primacy are detailed in regulations promulgated by EPA, which will be further discussed below. The amount of deviation from EPA regulatory requirements allowed for state UIC programs is dependent on the specific class of injection well at issue. With the exception of UIC programs for CO_2 geologic storage (Class VI), the EPA looks for state programs to be approved for primary authority over all injection well classifications and not to just cherry pick those programs that pose the least costs to a state's budget or those that are particularly popular.23

The UIC program recognizes six classifications of injection wells: Class I Industrial and Municipal Waste Disposal Wells, Class II Oil and Gas Related Injection Wells, Class III Injection Wells for Solution Mining, Class IV Shallow Hazardous and Radioactive Injection Wells (banned since 1984), Class V Wells for Injection of Nonhazardous Fluids into or Above Underground Sources of Drinking Water, and Class VI Wells used for geologic storage of CO₂. Although carbon management implicates two well classifications (Class II and Class VI), this memorandum will focus only on Class VI wells. As illustrated below, the regulatory and permitting requirements associated with Class VI injection wells are generally more detailed, complex, and restrictive.

3. Class VI – Deep Geologic Storage Wells

Class VI wells are used to inject CO2 into deep rock formations for long-term geologic storage. The EPA identified several unique qualities associated with CO₂ geologic storage wells necessitating enhanced requirements for Class VI injection. In the December 10, 2010 Federal Register publication setting forth EPA's final Class VI rulemaking decision, the EPA provided the following summary of these qualities:

It is expected that [geologic storage] projects will inject large volumes of CO₂. These volumes will be much larger than are typically injected in other well classes regulated through the UIC program, and could cause significant pressure increases in the subsurface. Supercritical or gaseous CO₂ in the subsurface is buoyant, and thus would tend to flow upwards if it were to come into contact with a migration pathway, such as a fault, fracture, or improperly constructed or plugged well. However, the pressures induced by injection will also influence CO₂ and mobilized fluids to flow away from the injection well in all directions, including laterally, upwards and downwards. When CO₂mixes with formation fluids, a percentage of it will dissolve. The resulting aqueous mixture of CO₂ and water will sink due to a density differential between the mixture and the surrounding fluids. CO₂ is also highly mobile in the subsurface (*i.e.*, has a very low viscosity), and, in the presence of water, CO₂ can be corrosive. These properties (of CO₂), as well as the large volumes that may be injected for [geologic storage] result in several unique challenges for protection of USDWs in the vicinity of [geologic storage] sites from endangerment.²⁴

While CO₂ itself is not a drinking water contaminant, CO₂ in the presence of water forms a weak acid, known as carbonic acid, that, in some instances, could cause leaching and mobilization of naturally-occurring metals or other contaminants from geologic formations into ground water (for example, arsenic, lead, and organic

²⁰ See 42 U.S.C. § 300h(d).

²¹ See 42 U.S.C. § 300h.

²² See id.

²³ See 75 Fed. Reg. 237 at 77242 (2010).

²⁴ See 75 Fed. Reg. 237 at 77234-77235 (2010).

compounds).²⁵ Another potential risk to USDWs is the presence of impurities in the captured CO₂ stream, which may include drinking water contaminants such as hydrogen sulfide or mercury. Additionally, pressures induced by injection may force native brines (naturally occurring salty water) into USDWs, causing degradation of water quality and affecting drinking water treatment processes. Research studies have shown that the potential migration of injected CO₂ or formation fluids into a USDW could cause impairment through one or several of these processes.²⁶

These concerns, in part, explain the increased level of information and monitoring required for Class VI wells. Not surprisingly, then, operators of Class II enhanced recovery wells wishing to inject CO_2 for long-term storage are required to apply for a Class VI permit where there is an increased risk to USDWs compared to traditional Class II operations using CO_2 . The EPA's rules allowed the constructed components of Class II wells to be grandfathered into the Class VI permitting structure at the discretion of the head of the state program, referred to in the SDWA as the Director.²⁷

Further underlying the EPA's concerns associated with Class VI geologic storage projects, the EPA has stated that the Class I UIC requirements for the injection of hazardous wastes formed the basis for many portions of the Class VI requirements.²⁸ This action has been cited by some as demonstrating that EPA has overstated the risks associated with Class VI geologic storage operations. Even those generally approving of the EPA's Class VI regulations, acknowledge the differences between risks associated with Class I hazardous waste injection and Class VI geologic storage injection. For instance, a paper included in the NPC report appendices on how to address risk associated by geologic storage co-authored by Scott Anderson of the Environmental Defense Fund, states that while some aspects, such as pressure maintenance, justify treating geologic storage injection similar to Class I hazardous waste injection, geologic storage poses much less risk in other important respects.²⁹ The NPC report calls on the EPA to issue a Class VI permit to drill within six months of application submittal and issue a permit to inject within six months as well.³⁰ Finally, the NPC recommends that the EPA undertake its "planned periodic review of the Class VI well rules, guidance, and implementation so that they are aligned with a site-specific risk and performance-based approach."³¹

A Class VI well permit from the EPA (or a state with primacy) will be required prior to the injection of captured CO₂ into deep rock formations for geologic storage. Class VI permits are issued for the life of the facility and the post-injection site care period. The EPA (or a state with primacy) reviews Class VI well permits at least once every five years.³² Permits, once issued, can be transferred to a new operator, modified, revoked or reissued.³³ Prior to issuance of a new Class VI Permit and prior to certain permit modifications, public notice must be mailed to interested parties and affected governmental entities setting out the proposed permit activity and setting a thirty-day period for public comments to be received on the proposed permit.³⁴ A public hearing can be called by the Director on his or her own or by request of a member of the public. When held, the public hearing will be for taking oral or written public comments on the proposed permit action, which hearing shall be transcribed.³⁵ At the time the Director makes a final permit decision, he or she shall provide notice to the applicant, applicable governmental agencies, and anyone who submitted a comment on the permit application.³⁶

³⁴ See 40 C.F.R. § 124.10.
 ³⁵ Id.

 ²⁵ See e.g., LDNR Ad Hoc Committee on Carbon Capture and Storage, March 25, 2021 Meeting (PowerPoint presentation by Laura Sorey, PG).
 ²⁶ See 75 Fed. Reg. 237 at 77234-77235 (2010).

²⁷ See 40 C.F.R. § 146.81(c). For those states without primacy and regulated directly by EPA, the EPA (or its Regions) takes the place of the State Director, where "Director" is used in the UIC rules. See 75 Fed. Reg. 237, 77242 – 77243 (Dec. 10, 2010).

²⁸ 75 Fed. Reg. 237 at 77257 (2010).

²⁹ See National Petroleum Council (NPC) Report, Working Document - Topic #4, Fred Eames and Scott Anderson, *The Layered Approach to Liability for Geologic Sequestration* (Dec. 12, 2019); see also Professor Keith Hall, "Analysis of Legal Issues Relating to Acquisition of Property Rights That Will Be Needed for Project, Such as Pore Space Rights and Surface Rights", at p. 113, *Integrated Carbon Capture and Storage in the Louisiana Chemical Corridor* (2019) (full article available at: <u>https://www.lsu.edu/ces/publications/2019/doe_carbonsafe_02-18-19.pdf</u>, last visited March 21, 2022).
³⁰ See NPC Report at 24.

³¹ *Id.*

³² See 40 C.F.R. § 144.36.

³³ See 40 C.F.R. § 144.39.

³⁶ Id.

Final permit decisions become effective thirty days after service of notice of the decision, unless a later date is established in the final permit decision, or an appeal of the permit decision is made.³⁷

The overarching consideration for the Director in deciding whether to issue a Class VI permit requires a determination that no permit authorizing injection results in the movement of a contaminant into drinking water. In addition to this overarching concern, the permitting process contains many more specific elements. Some of these elements ultimately may be made part of the permit as conditions, such as the establishment of the well's mechanical integrity prior to commencing injection and maintaining mechanical integrity through the operational life of the well, schedules of compliance, and monitoring.³⁸

The Director must consider specific information set forth in Section 146.82 in deciding whether to issue a permit. For this reason, a party applying to operate a Class VI well must provide the Director a "map showing the [proposed] injection well ... and the applicable area of review."39 The area of review ("AOR") is defined as "the region surrounding the geologic sequestration project where USDWs may be endangered by the injection activity" and is to be determined using computational modeling accounting for the physical and chemical properties of the injected carbon dioxide based on "available site characterization, monitoring, and operational data."⁴⁰ The map must depict the following surface features located within the AOR.⁴¹ the name and location of all wells (active, plugged and/or abandoned), state/EPA approved cleanup sites, surface bodies of water, springs, mines, quarries, and other pertinent surface features, including structures intended for human occupancy. The map also must show any known and suspected faults, geologic structures, the hydrogeologic properties, and subsurface features within the AOR. The application must include maps and stratigraphic crosssections of the base and location of all USDWs within the injection area.⁴² Geochemical data on subsurface formations are also required in order to help with analysis of how injected CO₂ is likely to react with the geology of the storage area post injection.43

Applications, in addition to this site characterization, must include proposed operating data for the proposed project. More specifically, this data includes the average and maximum proposed daily rate and total volume of CO_2 injection, the average and maximum injection pressure, the sources of the injected CO_2 , analysis of the chemical and physical makeup of the injected CO₂, proposed pre-operational formation testing information regarding the proposed stimulation program (description of stimulation fluids proposed and that stimulation will not interfere with containment), proposed injection procedure(s), schematics of construction details, well construction procedures, and any necessary corrective action within the AOR prior to injection.⁴⁴

A major component of the decision to construct by the applicant and to be approved by the Director involves the proper siting of the well and storage facility. Unsurprisingly, the EPA regulations provide for minimum criteria for siting. The applicant must demonstrate that the proposed location has geologic characteristics sufficient for the injection and storage facility. For instance, the applicant must prove that the injection zone is of "sufficient areal extent, thickness, porosity, and permeability to receive the total anticipated volume of the carbon dioxide stream." The applicant also must prove "confining zones free of transmissive faults or fractures and of sufficient areal extent and integrity to contain the injected carbon dioxide stream...and allow injection at proposed maximum pressures and volumes without initiating or propagating fractures within the confining zones."⁴⁵ In addition to providing the above-referenced data and performing data collection necessary to meet these application requirements, an applicant also may need to perform "corrective action" within the AOR to ensure the proposed project will not pose a threat to USDWs or public health. Section 146.84 sets forth

³⁷ See 40 C.F.R. § 124.15.

 ³⁸ See 40 C.F.R. § 144.1.
 ³⁹ See 40 C.F.R. § 146.82.

⁴⁰ See 40 C.F.R. § 146.48(a).

⁴¹ The type of information on geologic structure and hydrogeologic properties of the proposed site includes: (1) maps and cross sections of the AOR, (2) location, orientation, and properties of known or suspected faults and fractures, (3) data on the injection and confining zones, (4) geomechanical information of the confining zones, (5) seismic history information of the proposed site, and (6) geologic and topographic maps showing the regional and local geology and hydrogeology. See 40 C.F.R. § 146.82(a)(3).

⁴² Id. ⁴³ Id.

⁴⁴ See 40 C.F.R. § 146.82(a)(7). 45 See 40 C.F.R. § 146.83.

the process for identifying the AOR and determining what, if any, corrective action may be required. Applicants will be required to perform corrective action on all wells in the AOR necessary to "prevent the movement of fluid into or between USDWs." Corrective action for Class VI projects may entail properly plugging or re-plugging wells within the AOR that may pose a threat to fluid migration. Again, depending on the specific AOR, this corrective action could be a very significant undertaking. The requirement to perform corrective action does not end with issuance of a Class VI permit but continues for the life of the project, including possibly through post-injection monitoring.⁴⁶ This requirement can be based upon noted changes through the facilities operational life and during the permit re-evaluations required at least once every five years.

Other items required at the time of application include drafting an emergency and remedial response plan, a plan for post-injection site care and monitoring, and a demonstration of financial responsibility sufficient to cover carrying out both of these plans, as well as the cost of site closure, plugging, and site clean-up. EPA's Class VI regulations provide several options for acceptable financial security different from those provided in LDNR's Class II regulations.⁴⁷ For instance, insurance, self-insurance, and escrow accounts are listed as acceptable financial security under EPA's Class VI program and not under Louisiana's Class II regulations. These plans and financial responsibility must be maintained and updated throughout the life of the facility until ultimate closure. Similar to the corrective action requirements above, reconsideration of each of these occurs at least once every five years.

Finally, prior to making a decision on a Class VI well application, the EPA will need to undertake environmental surveys pursuant to the National Environmental Policy Act ("NEPA").⁴⁸ In the event that Louisiana receives primacy, LDNR-OC will be required to undertake similar, but different analysis, under the "rigorous balancing process" known as the "IT" analysis that includes consideration of alternative methods, sites, and mitigation measures to determine whether environmental harms are outweighed by economic and other benefits.⁴⁹

4. Louisiana's Permitting and Regulatory Considerations – Class VI Wells

Geologic storage projects involve a relatively new application of CO₂ injection technology and specific statutory mention in Louisiana of CO₂ geologic storage first appeared in 2008, around the same time that Congress created the 45Q tax credit. As noted above, in 2009, the Louisiana legislature enacted the La. GS Act, which significantly matched model legislation recommended by the Interstate Oil & Gas Conservation Commission in 2007.⁵⁰ The U.S. Environmental Protection Agency adopted its UIC regulations for Class VI CO₂ geologic storage wells on December 10, 2010. Notably, the enactment of the La. GS Act predates EPA's Class VI regulations.

More recently, the La. GS Act has been amended twice. In 2019, Act 297 clarified that the owner/operators of geologic storage facilities and not the CO₂ generators would be held responsible under regulations adopted by the Commissioner. More significant legislative amendments to the La. GS Act occurred in Act 61 of the 2020 Regular Legislative Session,⁵¹ which among other things removed CO₂ pipelines from the definition of geologic storage facilities, attempted to clarify what percentage of mineral interest owners need to consent to using productive hydrocarbon-bearing formations for geologic storage, and revised the injection fee calculation to be charged geologic storage operators in the State. How the La. GS Act and other Louisiana statutes and rules interact with federal regulations will be discussed briefly below. Working out specific steps for regulating geologic storage in Louisiana and the increased interest at both the state and federal level with how

⁴⁶ See 40 C.F.R. § 146.84(b).

⁴⁷ See 40 C.F.R. § 146.85(a)(1).

⁴⁸ See 42 U.S.C. § 4321, et seq.

⁴⁹ The "IT" analysis is named after the waste disposal company whose permit application was under review in the Louisiana Supreme Court case that first mandated the analysis. See Save Ourselves, Inc. v. LA Env. Control Commission, 452 So.2d 1152 (La. 1984).

⁵⁰ See generally Michael B. Donald, "Carbon Sequestration: Resource Management through Storage of Carbon Dioxide in Geologic Structures – A Proposed Legislative Framework for Louisiana, Annual Institute on Mineral Law", Vol. 56, Article 20 (2009); see also Michael. B. Donald, "Evolving Policies at the State Level – Highlights of the Louisiana Statute: Louisiana Takes a Proactive Approach in Act 517", University of Texas School of Law's Geologic Storage Policy: Federal Impacts, Commercial Opportunities (2010).

⁵¹ See 2020 Louisiana Regular Legislative Session, Senate Bill No. 353 (Sen. Hewitt), which became Act 61 in 2020.

best to regulate the conversion of CO₂ enhanced recovery projects into geologic storage projects will require additional state-based legislative and rulemaking activity in the years ahead.

5. What Permitting Might Look Like in Louisiana After Primacy Is Granted

Louisiana's Class VI well program will require all owners or operators seeking to inject carbon dioxide (or other oxides) for the purpose of long-term geologic sequestration to (1) obtain a Class VI permit to construct or convert a well and (2) gain approval to operate prior to commencing and injection activities. Based upon the number of applications already submitted to EPA for Class VI projects, LDNR anticipates that it will receive up to fourteen well permit applications during the first two years after the EPA approves its Class VI program. Right now, LDNR expects that will include nine (9) permit applications in Year 1 and five (5) permit applications in Year 2. Given LDNR's current staffing/resources, and assuming that applicants cooperate with the LDNR in the application process, LDNR projects that reviewing Class VI permit applications will take approximately nine to twelve months per project, following the submission date of a complete permit application.

The chart below shows the steps necessary for each phase of a geologic storage project per LDNR. These phases will be followed by the LDNR once primacy for Class VI wells is obtained. This chart is a helpful visual for mapping out each step along the way.⁵² Before beginning any geologic storage project, a meeting with Stephen Lee of LDNR's Injection & Mining Division (Telephone: 225-342-5569 or E-Mail: Stephen.Lee@la.gov) should be scheduled to discuss the parameters of the project and seek advice from LDNR as to the best way to proceed through the permitting process for geologic storage.⁵³ In addition, Class VI wells will undergo an environmental justice review, which is still under consideration and development by EPA.



The permit application form to be used by owner/operator will be Form UIC-60 CCS. This form must be used both for the initial permit submitted as well as the permit re-evaluation, which shall occur at a frequency of five years or less pursuant to La. Admin. Code tit. 43, § XVII.3609.M.1. All Class VI permit applications will be reviewed by LDNR staff and issued in accordance with La. Admin. Code tit. 43, § XVII, Subpart 6 (Statewide Order 29-N-6). When LDNR receives a permit application, the staff will review it to determine if it contains all the information required by La. Admin. Code tit. 43, § XVII.3605-3611. Any deficiencies in the application will be noted and, if necessary, the LDNR will request additional information from the applicant. After confirming that all of the required information has been submitted with the permit application, the LDNR staff will review to determine that the submitted data is accurate and of high quality (for example, has undergone appropriate quality assurance)

⁵² See LDNR Ad Hoc Committee on Carbon Capture and Storage, PowerPoint presentation by Laura Sorey, PG (held on March 25, 2021).

⁵³ Because the Commissioner of Conservation (currently, Richard P. Leyoub) must also approve any geologic storage projects, he will also be involved in the discussion with LDNR. The Commissioner must determine that either the reservoir intended for GS utilization is not capable of producing oil, gas, condensate or other commercial minerals in paying quantities, or, if it is so capable, he must find that a sufficient number of the effected mineral owners approve the use of the relevant reservoirs for GS. In the event the reservoir(s) proposed for GS includes commercial minerals in paying quantities the percentage of mineral interest owners that must approve such project are spelled out in two separate state statutes. See La. Rev. Stat. 30:1104 and 30:22; see also Commissioner of Conservation website: http://www.dnr.louisiana.gov/index.cfm/page/46 (last visited March 21, 2022).

procedures), is representative of the project and the site, and is sufficiently complete to support a full technical evaluation. Next, the staff will conduct a full technical evaluation of the information submitted to ensure the suitability of the site per the requirements at La. Admin. Code tit. 43, XVII.3615. This technical evaluation will include an evaluation of the geologic system (La. Admin. Code tit. 43, XVII.3615), the well (La. Admin. Code tit. 43, XVII.3617), and the proposed operations (La. Admin. Code tit. 43, XVII.3619) to ensure that the project will be protective of drinking water supplies as well as the health, safety, and welfare of the public.

As needed throughout the permit application review process, LDNR staff will discuss the application with the owner or operator to ensure that needed information is provided as expeditiously as possible. Once LDNR completes this review process, it will tentatively determine whether to prepare a draft permit or to deny the application. If the LDNR prepares a draft permit, it also will prepare a fact sheet summarizing the project (La. Admin. Code tit. 43, § XVII.3611.D) and issue a public notice of the comment period and a public hearing according to procedures listed in La. Admin. Code tit. 43, § XVII.3611.E. Public notice of the preparation of a draft permit must allow at least thirty (30) days for public comment. During the public comment period, any interested person may submit written comments on the draft permit and may request (in writing) a public hearing. Public notice of a hearing shall be given at least thirty (30) days prior. All relevant comments will be considered in making the final decision and will be addressed when a permit is issued or denied. After completion of the public hearing and review of public comments, a final permitting decision will be made and, where appropriate, a Class VI permit will be issued. The permit will authorize the applicant to construct the injection well or convert an existing well to Class VI. The LDNR also will issue a response to all relevant public comments received.

It is believed that during the first two years after approval of the state Class VI program, at least six permits will be issued by LDNR. Priority in the application queue will be based primarily on the relative date of submittal and then weighted by application completeness and size and nature of the project. Any administrative reviews of Class VI permits will take place in accordance with Sections 30:6 and 30:1105 of the Louisiana Revised Statutes. Any judicial reviews of Class VI permits will be conducted in accordance with Sections 30:12 and 30:15 of the Louisiana Revised Statutes.

6. Approval to Inject in a Class VI Well (Post-Permit Issuance) and Well Closure Considerations

Following well drilling/conversion/completion activities, the permit applicant will then submit information for the LDNR to consider in determining whether to approve operation of the injection well. If the information provided pursuant to La. Admin. Code tit. 43, § XVII.3619 warrants it, the agency will authorize the applicant to inject carbon dioxide. After the LDNR issues a permit-to-inject, the operator must submit monitoring data and reports according to La. Admin. Code tit. 43, § XVII.3629. After injection ceases, the operator must plug its well(s) in accordance with the Well Plugging Plan submitted per La. Admin. Code tit. 43, § XVII.3631.A.3 and after proper notice in accordance with La. Admin. Code tit. 43, § XVII.3631.A.4. Finally, a Well Closure Report will be submitted to LDNR as required in La. Admin. Code tit. 43, § XVII.3631.A.5.

After cessation of injection, but prior to plugging and abandonment of site wells, the operator must either (1) demonstrate that its Post Injection Site Care and Closure plan(s) are applicable, or (2) update the plan(s) as required in La. Admin. Code tit. 43, § XVII.3633.A.1.c in accordance with the requirements listed in La. Admin. Code tit. 43, § XVII.3633.A.1.b. Prior to authorization of site closure, the operator must monitor the site for at least fifty (50) years or for the duration of the alternative timeframe approved by the Commissioner pursuant to La. Admin. Code tit. 43, § XVII.3633.A.3.

Finally, the operator must publish a notice of intent for closure in accordance with La. Admin. Code tit. 43, § XVII.3633.A.4, may plug all monitoring wells after approval of site closure by the Commissioner in accordance with La. Admin. Code tit. 43, § XVII.3633.A.5, and must submit a final site closure report in accordance with La. Admin. Code tit. 43, § XVII.3633.A.6.

7. Testing and Monitoring Plans to be Submitted to LDNR

Prior to the approval of injection, a testing and monitoring plan must be approved by the LDNR, per La. Admin. Code tit. 43, § XVII.3625.A. The requirements of this plan will be reported as follows: (1) the operator will report the analysis of the carbon dioxide stream required in La. Admin. Code tit. 43, § XVII.3625.A.1 as a summary report with cover letter and appended analyses; (2) operator will submit pressure, rate, and volume monitoring data required by La. Admin. Code tit. 43, § XVII.3625.A.2 as an excel or comma-delineated sheet with a graphical presentation (including raw data as required under La. Admin. Code tit. 43, § XVII.3625.A.3 as a report with a cover letter; (4) operator will submit groundwater data for any monitored zones per La. Admin. Code tit. 43, § XVII.3625.A.4 as a summary report with cover letter and appended analyses; (5) prior to conducting an external or internal mechanical integrity test, casing inspection log, or pressure fall-off test as stipulated in the approved monitoring and testing plan and required under La. Admin. Code tit. 43, § XVII.3625.A.5 and 6, the operator must first apply for a work permit using Form UIC-17; and (6) other monitoring required in the approved testing and monitoring plan and required under La. Admin. Code tit. 43, § XVII.3625.A.7-9 will be submitted as a summary report with cover letter and appended analyses and data.

Monitoring reports in accordance with the approved plan must be submitted semi-annually as prescribed in La. Admin. Code tit. 43, § XVII.3629.A.1; with certain reports including mechanical integrity test results submitted within thirty days of the test per La. Admin. Code tit. 43, § XVII.3629.A.1.b; and with a report of any non-compliance submitted within twenty-four hours per La. Admin. Code tit. 43, § XVII.3629.A.1.c. Mechanical Integrity tests ("MIT") are conducted frequently throughout the life of the well. When the operator submits a Form UIC-17 is to the LDNR, staff review the scope of work and may request scope revisions prior to issuing an approved work permit. Applicants must include statement that the MIT will be witnessed by a Conservation Enforcement Specialist ("CES"). Upon approval of the work permit by LDNR, the operator must contact the appropriate CES and give forty-eight hours prior notice before beginning the MIT. After scheduling the MIT based upon the CES' availability to witness, the operator may then conduct the proposed operation and, upon completion, must submit a summary of the work conducted on Form UIC WH-1 (with appended data) This process for conducting an MIT is the standard procedure for Class I, II, III, and V wells currently.

Compliance monitoring will include, at a minimum, on-site inspections conducted by authorized agents of the LDNR and a review of operating and monitoring reports submitted in compliance with La. Admin. Code tit. 43, § XVII.3629 to verify that the construction, completion, operation, maintenance, and site closure (La. Admin. Code tit. 43, § XVII.3633) of CCS projects are performed according to approved plans and specifications and meet all permit and regulatory requirements. Louisiana's compliance monitoring program includes the following activities:

- Reviewing plans and reports (e.g., well completion reports, test results, workover reports) submitted by permit applicants or owners or operators.
- Conducting site inspections to verify or witness construction, operation and testing/maintenance procedures. Site inspections will be conducted by the agency's authorized agents.
- Investigating complaints alleging improper construction, completion, operation or maintenance of a CCS project.
- Performing compliance monitoring (for example, reviewing monitoring, operating and maintenance data) to verify compliance with permit conditions, regulations and any other conditions or stipulations.
- Conducting annual inspections and compliance follow-up inspections of CCS projects.

Any owner/operator violating La. Admin. Code tit. 43, § XVII Subpart 6, Chapter 6 (Statewide Order 29-N-6), any condition of a Class VI permit, or any rule or order of the LDNR will be subject to enforcement action. The agency is responsible for initiating, pursuing and resolving enforcement actions. Enforcement proceedings may result in modification, revocation or suspension of any permit issued under authority of the UIC Program. The LDNR will attempt to handle all minor violations through informal means, such as correspondence between agency staff and the alleged violator. If initial correspondence does not result in the resolution of minor violations, a Notice of Violation ("NOV") may be issued. If the violation(s) grows in size or scope, LDNR may issue a Compliance Order without a civil penalty. The final enforcement stage, typically reserved for egregious non-compliance or endangering United States Drinking Water, involves the issuance of a Compliance Order with civil penalty. Issuance of NOVs, Compliance Orders, and Compliance Orders with civil penalties are entered and tracked through the well information and well history database known as SONRIS, which is maintained by LDNR (www.sonris.com). If a Compliance Order with civil penalty is required, the State may seek civil penalties up to \$5,000 per day per violation under Section 30:1106.D(1) of the Louisiana Revised Statutes.

8. The Importance of Mechanical Integrity Tests (MITs) and Financial Responsibility of Owner/Operators

To ensure proper performance of the Class VI wells and to evaluate the absence of significant leaks, owners or operators of Class VI wells must continuously monitor injection pressure, rate, injected volumes, pressure on the annulus between tubing and long-string casing, and annulus fluid volume following an initial annulus pressure test, pursuant to La. Admin. Code tit. 43, § XVII.3621.A.6. Additionally, annulus pressure tests must occur on an annual basis and after performing any well workovers that involve unseating the tubing or packer, pursuant to La. Admin. Code tit. 43, § XVII.3627.A.2. At least once every twelve months, owners or operators must use an approved tracer survey or a temperature or noise log to determine the absence of significant fluid movement pursuant to La. Admin. Code tit. 43, § XVII.3627.A.3.

The LDNR may require additional or alternative tests if the results presented by the owner/ operator are not satisfactory to demonstrate mechanical integrity pursuant to La. Admin. Code tit. 43, § XVII.3627.A.5. The agency expects to review the results of approximately twenty (20) MITs from Class VI well owner/operators each year.

Moreover, Louisiana's regulatory requirements (La. Admin. Code tit. 43, §:XVII.3609.C) state that owner/operators of Class VI wells must demonstrate and maintain financial resources to perform all required corrective action, plug any injection well, conduct post-injection site care and site closure, and perform any needed emergency and remedial response. LDNR staff with financial expertise will be tasked with reviewing any cost estimates provided by the owner/operators to verify the estimates will cover these activities and also will evaluate the financial instruments submitted by the applicant submits to determine the owner/operator to be qualified and the instruments to be appropriate. Even after the financial instruments have been approved, LDNR staff will continue these ongoing efforts to make sure the operator maintains financial responsibility: (1) update annual cost to account for inflation; (2) update cost following amendment of project plans; and (3) oversight of financial instruments to make sure they remain active, sufficient, and meet the criteria required pursuant to La. Admin. Code tit. 43, § XVII.3609.C.

The owner or operator will be required to submit all required reports, submittals, and notifications under La. Admin. Code tit. 43, § XVII.3629 to both the LDNR and to the EPA, in an electronic format. To ensure that both the State of Louisiana (as the primacy authority) and EPA (as the oversight authority) have consistent data throughout program implementation, LDNR will submit to the EPA (or allow EPA to view) all Class VI reports, submittals, and notifications submitted to Louisiana.

B. Expropriation of Property Per the Louisiana Geologic Sequestration of Carbon Dioxide Act

One of the unique features of the La. GS Act (and something that contributes to Louisiana being so attractive for CCS projects) is that it permits expropriation of formations and wells in Louisiana. Title 19 of the Louisiana Revised Statutes governs expropriation of property under Louisiana law. As a general practice under current law, it is encouraged that a landowner and a company seeking to obtain rights to store CO_2 in pore space

negotiate in good faith for a lease (or some other legal agreement conferring rights) of said pore space. Nevertheless, in the event that an agreement with a private landowner cannot be reached for the property rights necessary for geologic storage (including related pipelines or pipeline transportation of CO₂ for enhanced recovery projects), Louisiana law authorizes eminent domain of private property by private entities, but certain steps must be followed in accordance with Title 19.

Prior to being able to utilize this expropriation authority, however, the company proposing the geologic storage project must, among other things, first apply for and receive a certificate of public convenience and necessity from the Commissioner of Conservation.⁵⁴ This certificate only can be issued upon application, notice and public hearing in the parish in which the geologic storage project is proposed to be located.⁵⁵ The Commissioner must find that the proposed project will meet all regulatory requirements and will not "contaminate other formations containing fresh water, oil, gas, or other commercial mineral deposits," endanger human life or cause a "hazardous condition of property" and that the proposed storage reservoir is suitable for such use.⁵⁶ This certification does not classify any operator as a common carrier or subject such operator to any duties, obligations, or liabilities as a common carrier or public utility. Classification as a common carrier or public utility is not required to utilize the eminent domain laws for a geologic storage project in Louisiana.⁵⁷

A company, prior to filing a lawsuit seeking to expropriate property, must "attempt in good faith to reach an agreement as to compensation with the owner."⁵⁸ Additionally, the company seeking expropriation rights must provide the owner of the property information concerning the appraisal or evaluation of the property, including the amount appraised, name of person performing the appraisal or evaluation and their methodology.⁵⁹ Additional notices including the possibility of expropriation, the authority under which expropriation is being claimed, and the rights of the property owner to hire their own representation must also be sent to the owner.⁶⁰ If agreement still cannot be reached after at least thirty days from these notices, then a petition for expropriation may be filed in the parish in which the property is located, setting forth the authority for expropriation and praying that the property be expropriated for just compensation.⁶¹

Valuation must be based on the "value the property possessed prior to the contemplated improvement was proposed". Courts must hear expropriation suits by preference, with all decisions decided by the trial judge, with the exception of compensation, which may be tried by the jury upon the request of either party.⁶² Because these provisions have never been utilized for a geologic storage project, it remains unclear how valuation will be determined by Louisiana's courts on a going forward basis. For example, no practice exists to determine what comparable prices will be used. While examples of hydrocarbon storage agreements exist, how the differences in the underlying economics of geologic storage will be taken into consideration in an expropriation scenario have yet to play out in the real world. Thus, further analysis of valuation is recommended for a company considering expropriation for geologic storage.

C. Risk Mitigation When It Comes to CCS Projects

Risk mitigation poses a complex topic when considering geologic storage because it encompasses so many aspects of operations, finance, and other legal obligations. While it could be its own stand-alone memorandum, a better understanding of the potential risks associated with geologic storage is important to identify the best way to mitigate risks and to address any concerns. Possible risks include: regulatory obligations; monitoring, mitigation, and remediation of any leaks; paying back tax incentives (or other economic

⁵⁴ See La. Rev. Stat. §§ 30:1104(C), 30:1107. A similar requirement exists for pipeline operators associated with enhanced recovery projects. The rules governing such hearings for enhanced recovery CO₂ pipelines can be found at La. Admin. Code 43:XI, Chapter 7.
⁵⁵ Id.

⁵⁶ Id.

⁵⁷ See La. Rev. Stat. § 30:1107(C).

⁵⁸ See La. Rev. Stat. § 19:2.

⁵⁹ See La. Rev. Stat. § 19:2.2.

⁶⁰ Id.

⁶¹ See La. Rev. Stat. § 19:2.1. Note that if the property lies in two or more parishes, then the petition must be filed in the parish where the owner resides. If the owner does not reside in any of the parishes, then the petition may be filed in any of the parishes in which the property is located.

⁶² See La. Rev. Stat. §§ 19:8 – 19:9.

incentives) in the event CO₂ is no longer securely stored; risks of subsurface trespass; and potential litigation for personal or property damage.⁶³

This portion of the memorandum primarily will discuss aspects of liability specifically addressed in the La. GS Act.⁶⁴ The La. GS Act spells out several specific limitations on liability associated with carbon dioxide geologic storage projects. These include limitations on both regulatory liability and civil liability under tort, contract, or other liability theories. No similar liability limitations are provided for enhanced recovery projects. This portion of the paper provides some thought on how the releases of liability in the La. GS Act may interact with UIC regulatory responsibility. It points out matters for further study and consideration as it concerns other liability questions, and it avoids discussing liability associated with 45Q tax recapture in the event that CO₂ is no longer securely stored, though all of these topics are certainly worthy of further study.

The La. GS Act creates a trust fund at the state level to pay for activities such as long-term inspection, monitoring, and closure costs, including the plugging and abandonment of remaining wells, remediation of mechanical problems associated with remaining wells or site infrastructure, to repair mechanical leaks at the facility, administration of the La. GS Act by the LDNR-OC, and to pay for the acquisition of "appropriate insurance for future storage facility liability."⁶⁵ So long as the Carbon Dioxide Geologic Trust Fund contains adequate funding, and barring fraudulent activity, the law creates a release of "the storage operator, all generators of any injected carbon dioxide, all owners of carbon dioxide stored in the storage facility, and all owners otherwise having any interest in the storage facility" of "all duties or obligations" under the La. GS Act "and any and all liability associated with or related to" the geologic storage facility "after issuance of the certificate of completion of injection operations."⁶⁶ This release seems relatively broad and without determining exactly how broad, it clearly intends a release from responsibility of duties and obligations under the La. GS Act. Such release from regulatory responsibility only can occur if the Commissioner certifies completion of injection operations based upon a showing of a reasonable expectation that the reservoir will maintain mechanical integrity and the stored carbon will remain in place.⁶⁷ Upon issuance of the certification of completion of injection operations, the state becomes the owner of the remaining project, including the stored CO₂.

Exactly how this transfer of ownership to the state envisioned in the La. GS Act will interact with EPA Class VI regulatory requirements is not completely clear. Federal legislation creates the EPA UIC obligations, and these obligations exist separately and apart from the La. GS Act; however, the La. GS Act authorizes the Commissioner to carry out the UIC program at Section 30:1106 of the Louisiana Revised Statues. It seems likely that the EPA will argue that this statute does not and cannot release a responsible party from its UIC obligations, but merely directs the Commissioner to be the correct state authority from which to seek UIC primacy and sets forth the procedures for UIC enforcement in the event the Commissioner is granted primacy. This assumption is based on the EPA's response to several comments received during its rulemaking process concerning transfer of long-term liability to a state entity post GS injection operations, where it ultimately responded that "under current SDWA provisions EPA does not have authority to transfer liability from one entity (that is, owner or operator) to another."⁶⁸

The fifty-year default post-injection monitoring and site care plan found in EPA's Class VI regulations seems to have extended the time-frame for post-injection monitoring and closure. During such period, the operator remains responsible for meeting UIC requirements, beyond what was expected by the authors of the La. GS Act, which envisions the transfer of ownership to the state occurring as early as ten years after cessation of injection operations.⁶⁹ Regardless, the La. GS Act makes it clear that this release of liability for the owners/operators of the geologic storage facility is not intended to transfer any liability to the state. The mere

⁶³ See NPC Report at 28.

⁶⁴ See House Bill No. 661 of 2009, Louisiana Legislative Session; see also La. Rev. Stat. §§ 30:1101 et seq.

⁶⁵ See La. Rev. Stat. § 30:1110 (creates the Carbon Dioxide Geologic Storage Trust Fund or the "Trust Fund"). The Trust Fund will be funded by all fees, penalties, and bond forfeitures collected pursuant to the La. GS Act, private donations, interest earned on the fund, and Site Specific Trust Accounts. Exactly how and the amount of certain fees will be collected for this fund will rely upon future rulemaking by the Commissioner.
⁶⁶ See La. Rev. Stat. § 30:1109(A).

⁶⁷ Id.

⁶⁸ See 75 Fed. Reg. 237, 77271 – 72 (2010).

⁶⁹ *Id.*; see also La. Rev. Stat. § 30:1109(A)(1) ("Ten years, or any other time frame established by rule, after cessation of injection into a storage facility, the commissioner shall issue a certificate of completion of injection operations, upon a showing by the storage operator that ...").

act of the state becoming the owner of the remaining project does not lead to the state assuming or having any liability.⁷⁰ As previously mentioned, one aspect of a state gaining primacy is being able to prove its ability to ensure compliance with the EPA regulatory requirements. State policies relieving an operator of regulatory responsibility prior to site closure pursuant to EPA regulation may endanger the state's ability to gain or maintain Class VI primacy.

Another issue arises from the fact of the Commissioner being statutorily authorized by the La. GS Act to perform or to contract for long-term site monitoring and to undertake final closure of a geologic storage project following his issuance of a certificate of completion of injection operations for that facility.⁷¹ If the Commissioner's office both undertakes Class VI long-term monitoring responsibility and receives Class VI primacy, then a scenario will be foreseeable where the Commissioner acts both as a UIC operator and the UIC regulator, potentially creating a serious conflict of interest. Because the authority associated with issuing a certificate of completion of injection operations of the Commissioner will provide a path around these obstacles. Also, future EPA decisions may provide guidance as to the potential constraints placed on state statutes by the Class VI post-injection monitoring requirements.

Concerns about such transfers of ownership post-injection have been raised by interested nongovernmental organizations. More specifically, a main concern cited by some involves how removal of liability post-injection may negatively alter the incentive for operators to operate prudently and safely. Some also mention the danger in frontloading all of the risk associated with geologic storage operations for operators to the beginning of the project where challenges with permitting and construction will be the most expensive. Conversely, such transfers are said to backload the risk on states to a point in time where the project no longer will be earning money either for the operator or for the state (through either storage rights payments or regulatory fees), thus increasing the risk of unfunded liabilities falling to the public. Those who support such transfers can point to the fact that the greatest risk of release or leakage occurs during injection operations, and, therefore, the transfer of ownership occurs at a time when such risks are diminishing.

Alternative approaches have been proposed including a layered approach to covering risk, whereby in addition to protections provided by well-functioning state regulation including acceptable financial assurance, U.S. Department of Energy ("DOE") would be authorized to voluntary choose geologic storage projects to grant governmental assurances to cover a certain portion of risk throughout the life of the project with an overall cap in the amount the government agrees to cover. This layered approach would address the concern of incentives for safe operations, while providing concrete advantages in liability reduction for geologic storage operators. One proposal for how to manage post-injection transfers to the state comes from a United Kingdom panel recommendation to create an independent public company to handle all aspects of long-term monitoring, closure, and risk associated with the post-injection life of a geologic storage project. This proposal perhaps would provide greater flexibility in managing risks while avoiding any potential conflicts of interest created by the same governmental entity being both the regulator and regulated.

The La. GS Act also authorizes facility operators to further limit their regulatory liability by establishing Site-Specific Trust Accounts ("SSTA") to cover site-closure and remediation costs of the facility. The SSTAs authorized by the La. GS Act are clearly similar to (and likely modeled after) the SSTAs authorized under the Louisiana's Oilfield Site Restoration Act. At the time of transfer of the geologic storage facility from one party to another (not including transfer to the State pursuant to Section 30:1109(A)), an SSTA may be established to provide for funds necessary for long-term maintenance, monitoring, and site closure or remediation of the storage facility. A third-party assessment contractor approved by the Commissioner determines an assessment of such costs. This assessed cost estimate must be updated routinely every five years. The former operator also must propose for the Commissioner's approval a payment schedule to fully fund the SSTA. Once the SSTA has been approved and fully funded, "the party transferring the storage facility site and all prior owners, operators, and working interest owners shall not thereafter be held liable by the state for any site closure costs or actions

⁷⁰ See La. Rev. Stat. § 30:1109(A)(4).

⁷¹ See La. Rev. Stat. §§ 30:1109(Å), 30:1110(E).

associated with the transferred storage facility site." Many of the specifics of these provisions depend upon future rulemaking by the Commissioner.

Finally, a couple of changes have been made to the La. GS Act since its adoption in 2009. Act 297 of 2019 makes it clear that the owner, shipper, or generator of the CO_2 is not deemed responsible for meeting the regulatory requirements associated with Carbon Storage unless such owner, shipper or generator also the owns or operates the GS facility. Act 61 of 2020 deletes CO_2 pipelines associated with GS operations from the definition of "storage facility" found in Section 30:1103 of the Louisiana Revised Statues, seemingly intended to ensure that it can be regulated as a separate entity under pipeline-specific regulatory requirements. Future amendments to the La. GS Act seem likely as its implementation comes into clearer focus and perhaps, thus, providing an opportunity to address some of the potential challenges mentioned herein.

D. Other Kinds of Liability Generally Under Louisiana Law

One potentially may read the release from liability found in Section 30:1109(A) of the Louisiana Revised Statutes broadly enough to cover all other potential liability arising after issuance of the certificate of completion of injection operations. Yet, this statute also raises many questions about when the "liability associated with or related to [a] Storage Facility arises." Is it, for instance, when an injected CO_2 plume crosses a property line underneath a tract for which the operator has obtained no storage rights? Or, in such a hypothetical, is it when the neighboring tract owner becomes aware of such unauthorized movement underneath his property? Or, when the operator knew or should have known? Presuming such potential trespass is discovered long after the certificate of completion, how does one prove the timing of this plume movement? Furthermore, does the liability arise when injection operations that subsequently lead to the CO_2 plume migration are still ongoing and thereby occur prior to the issuance of cessation of injection operations?

In the event any such liability release is ultimately found to release the former operators and owners of liability to this hypothetical landowner, does that leave the claimant landowner without recourse? As previously mentioned, the release of liability and transfer of ownership to the state, does not by itself make the state liable. The Carbon Dioxide Geologic Trust Fund does not authorize expenditures to cover such claims. Meaning even if a party were to have a claim against the state for a geologic storage facility, the normal avenues for recovery against the state would need to be followed. Whether contractual obligations could impose obligations beyond this certification and transfer of ownership to the state is yet another question requiring further development in the case law.

The La. GS Act, in addition to the post-injection release of liability, provides specific caps on damages for non-economic loss alleged in civil suits filed against an owner or operator of a GS "facility, carbon dioxide transmission pipeline, or the generator of the carbon dioxide being handled by either the facility or pipeline." Such caps appear to apply for claims arising at any point in a geologic storage facilities operational life. The cap is set at \$250,000 per occurrence, except when the occurrence leads to non-economic losses for wrongful death or more serious injuries, in which case the cap on the damages is \$500,000 per occurrence.

Another consideration arises from potential constitutional challenges to such liability releases and limits. For example, certain caps on damages for medical malpractice claims have led to previous constitutional challenges.⁷² Finally, Louisiana tort law is governed by the articles contained in Book III, Title V, Chapter 3, of the Louisiana Civil Code, which includes Articles 2315 through 2324.2. As the law stands now, strict liability in tort is unlikely to apply to the operation of a CO₂ pipeline and storage facilities in Louisiana. Instead, a plaintiff likely would have to prove that conduct of the owner or operator of such facilities fell below a standard of reasonable conduct.

The impacted party, in the event of CO₂ intrusion into adjacent lands, also may assert a claim for trespass or "obligations of neighborhood[,]" which essentially is the same as a claim for nuisance. In each case, the

⁷² See, e.g., Oliver v. Magnolia Clinic, 85 So. 3d 39 (La. 2012).

plaintiff must prove that the defendant knew or should have known of the risk harm and failed to act with reasonable care.

The primary source of the obligations of neighborhood may be found in Article 667 of the Louisiana Civil Code, which imposes limitations on a person's use of the property that he or she owns. The statutes provides in pertinent parts:

Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.⁷³

If the factual bases of a plaintiff's claim includes allegations that carbon dioxide stored in the subsurface migrated into the subsurface or airspace of plaintiff's property without the plaintiff's permission or some other grounds for the right of entry, and that the carbon dioxide then caused harm, the plaintiff might assert a claim for trespass. To support liability under Louisiana law, the entry must be intentional or negligent.⁷⁴ Whether the plaintiff alleged an intentional trespass or negligent trespass, Louisiana law would require the plaintiff to show damages in order to recover in trespass.

E. Environmental Justice Considerations for a Class VI Permit Application in Louisiana

As part of the Class VI well permit application, LDNR⁷⁵ will require⁷⁶ the owner or operator to conduct an environmental justice ("EJ") review and submit a report as part of the application process. Environmental justice refers to the kind of analysis⁷⁷ when regulators engage in rulemaking action to ensure fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Although the concept of environmental justice has existed for several years, it has recently gained a lot of traction under President Joe Biden.⁷⁸ Within the last twelve to fourteen months, there are a several events⁷⁹ emphasizing a

 $^{^{\}rm 73}$ See La. Civ. Code art. 667; Acts 1996, 1st Ex. Session, No. 1.

⁷⁴ See, e.g., Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co., 803 So.2d 86 (La. App. 4 Cir. 11/14/01).

⁷⁵ Recipients of federal assistance are required to follow certain federal guidelines. If Louisiana's primacy application is granted, the Injection and Mining Division of the Office of Conservation ("IMD") will receive federal funding to permit and regulate Class VI wells, thus subject to requirements under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Age Discrimination Act of 1972, *i.e.*, if a state receives funding for primacy of an EPA program, EPA will reference these laws (and maybe others) requiring an EJ analysis. Class VI permit applications and renewals will require an analysis of cumulative impacts on overburdened communities. Further, EPA will increase support for community-led action by providing unprecedented investments and benefits directly to communities and potentially influencing federal partners or agencies under National Environmental Policy Act (NEPA) and section 309 of Clean Air Act. EPA acknowledges the enforcement challenges given a bulk of implementation will be via state agencies for environmental permitting, contamination clean up, infrastructure investment, facility siting, and transportation. ⁷⁶ At this time, there is inconsistent EJ authority and no federal law, albeit some state laws. Currently, there are ten states with active EJ policies or

rulemaking in progress, such as New Jersey and California, sixteen with some EJ statements or outreach programs but no rulemaking, and twenty-four with no EJ policy or plans in development. Thus, the regulator is potentially forced to create state-specific regulatory regimes during the permitting process by looking to existing statute or regulation, non-binding policy documents, and executive orders. Therefore, the permittee must consider whether EJ driven actions are required or discretionary to assess a course of action.

⁷⁷ The current authority for environmental justice and enforcement falls under the Civil Rights Act Title VI, Sections 601 and 602. <u>Section 601</u>: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.] <u>Section 602</u>: Authorizes federal agencies "to effectuate the provisions of § 601] by issuing rules, regulations, or orders of general applicability." See *Guardians Ass'n v. Civil Service Comm. of the City of New York*, 463 U.S. 582 (July 1, 1983): Section 601 requires proof of intentional discrimination. *See Alexander v. Sandoval*, 532 U.S. 275 (Apr. 24, 2001): Section 602 doesn't provide for private people to enforce regulations; result is agency loses funding EJ communities moved to filing administrative complaints with federal agencies, such as EPA. EPA's Office of Civil Rights (OCR): charged with processing Title VI complaints. *See* 40 C.F.R. Part 7.

⁷⁸ Anecdotally, the initial plan of the Biden administration was to legislatively reverse *Sandoval* and overhaul the EPA External Civil Rights Compliance Office. Given the gridlock between the Administration and Congress, it's unclear if this remains a priority.

⁷⁹ On April 7, 2021, Administrator Regan directed EPA to strengthen enforcement in overburdened communities, assess and reduce impacts to overburdened communities from regulations, and conduct meaningful and frequent engagement with EJ communities affected by rulemakings, permitting, and enforcement. Subsequently, EPA issued the following guidance—(1) on April 30, 2021, issuing "Strengthening Enforcement in Communities with Environmental Justice Concerns", (2) on June 21, 2021, issuing "Strengthening Environmental Justice Through Cleanup Enforcement Actions". In addition to these directives, EPA released its strategic plan on October 4, 2021, NEPA regulations on October 7, 2021, and cumulative risk guidance in December 2021.

high level of scrutiny, albeit ambiguous, for environmental justice during the permitting process. In fact, Michael S. Regan, EPA's 16th administrator, sworn in on March 11, 2021, was chosen due to his experience⁸⁰ mitigating impacts to overburdened communities⁸¹ in North Carolina.

While the new Administration has made EJ a priority, the underlying analysis driving EJ is not new. In fact, the *cumulative risk*⁸² assessment was originally floated by Bush Administration in 2003 and then raised in Obama's 2014 environmental agenda but stalled. The change with the Biden Administration is the prioritization and intent to enforce⁸³ via a *whole-of-government*⁸⁴ approach, potentially increasing the risk the analysis is not limited directly to an applicant or permittee's facility.⁸⁵

President William J. Clinton issued Executive Order 12898,⁸⁶ creating the EPA's Office of Environmental Justice ("OEJ") in which all EJ activities within the agency are coordinated.⁸⁷ Since its creation, OEJ strives to provide guidance and criteria for implementing an environmental justice analysis by developing a number of guidelines regarding what it should look like, unfortunately its implementation and application to rulemaking efforts remain unclear and amorphous.

Nonetheless, an EJ review will be encouraged in the pre-permitting process and required early in the formal permitting process. At a minimum, Louisiana will require a report to consider the data and factors available in the EPA-developed EJSCREEN tool (which can be found at https://www.epa.gov/ejscreen) and identify any portions of the area of review ("AoR"), which encompass EJ areas. Once the application is submitted, LDNR's staff will use the EPA-developed EJSCREEN tool to evaluate the location of the project to make sure that it does not disproportionately impact certain demographic areas. The EJ impact report submitted by the applicant will be reviewed to ensure that it is thorough, contextualized, and agrees with the data from the EJSCREEN tool. If a proposed site is found to be located in communities with high EJ risk factors, the Commissioner of Conservation may extend the public comment period for the application and also may require a more inclusive public participation process, including targeted public outreach and creation of better visual tools and approachable language. If the EJ review is especially complex or time-consuming, LDNR may opt to outsource this assessment to a qualified third-party reviewer.

Louisiana regulators, in addition to the site-location questions of the EJ review, also conduct a weighing of siting, environmental effects, and a cost-benefit analysis as required by the application of the decision in *Save Ourselves, Inc., et al. v. the Louisiana Environmental Control Commission*, 452 So.2d 1152 (La. 1984). In *Save Ourselves, Inc.*, the Louisiana Supreme Court set forth five areas of inquiry, which became known colloquially as the "Louisiana Constitutional Considerations." Those questions include:

⁸⁰ Administrator Regan was previously the secretary of North Carolina's Department of Environmental Quality.

⁸¹ Defined by EPA as a minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities (available at:<u>https://www.epa.gov/environmentaljustice/ej-2020-glossary</u>, last visited on March 19, 2022).

⁸² The cumulative risk assessment looks at risks from overlapping environmental hazards, by looking at air quality, water, chemical mixtures, and nonchemical stressors, such as higher at-risk local populations.

⁸³ Section 303 of the Clean Air Act, Emergency Powers, requiring imminent and substantial endangerment to public health, welfare, and the environment. This allows for immediate shutdown of a suspected source, lasting for no more then sixty days. This provision is rarely invoked, but it was invoked twice in May 2021—(1) on Limetree Bay Terminals, LLC (a petroleum refinery) located in St. Croix, U.S. Virgin Islands and (2) on New Indy (a paper mill) in Catawba, South Carolina.

⁸⁴ This appears to be an overarching and unifying objective by creating roles for all agencies and appointing individuals with strong EJ backgrounds. To help coordinate this approach, the White House created its own Environmental Justice Advisory Committee ("WEJAC"). In addition to WEJAC, the other key committees and offices are National Environmental Justice Advisory Committee ("NEJAC") and External Civil Rights Compliance Office ("ECRCO"). ⁸⁵ Further, the EPA will focus on, "[c]ommunities with multiple industrial and energy facilities and are saturated with legacy pollution want to see EPA

realign its enforcement in a way that provides action, accountability, and guidance for taking cumulative impacts and risks into account, <u>even if they</u> <u>cannot be measured with precision.</u>" (emphasis added) U.S. Environmental Protection Agency, *FY 2022-2026 EPA Strategic Plan Draft* 28 (2021). ⁸⁶ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

⁸⁷ OEJ was created in 1992. Its mission is to coordinate the agency's efforts to address the needs of vulnerable populations by decreasing environmental burdens, increasing environmental benefits, and working collaboratively to build healthy, sustainable communities. OEJ provides financial and technical assistance to communities working constructively and collaboratively to address environmental justice issues. The Office also works with local, state, and federal governments; tribal governments; community organizations; business and industry; and academia, to establish partnerships seeking to achieve protection from environmental and health hazards for all people regardless of race, color, national origin, or income.

- 1. Have the potential and real adverse environmental effects of the proposed project been avoided to the maximum extent possible?
- 2. Does a cost benefit analyses of the environmental impact costs versus the social and economic benefits of the proposed project demonstrate that the latter outweighs the former?
- 3. Are there alternative projects which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits?
- 4. Are there alternative sites which would offer more protection to the environment than the proposed site without unduly curtailing non-environmental benefits?
- 5. Are there mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits?

Answers to these questions must provide adequate detail with sufficient justification and supporting data to enable the LDNR to conduct a balanced review of environmental, social, economic and other factors as required by the Louisiana Constitution.

F. Conclusion

The development of the regulatory and legal framework around CCS is ongoing and continues to take shape, as interest and investment continue to grow. By this time next year, Louisiana will (hopefully) have obtained primacy from the EPA and begun accepting and reviewing permits for Class VI wells around the State. Only time will tell how robust the program will be, but if the recent actions of the major and independent oil and gas companies (*i.e.,* investment in technology and leasing of pore space) mean anything, then CCS is going to have a very bright future in the State of Louisiana, which is not only good for the State but also the businesses and industries that operate here.

State Administration/Preemption vs. Local Regulation of Mineral Exploration

Christopher J. Lento

There is an inordinate amount of factors to consider when examining the State's involvement in mineral exploration within its borders. While there numerous financial, geoscience and environmental factors in play, at every step of the process those factors should be balanced against policy considerations, and even those policy considerations often have to be weighed against competing policy concerns.

State vs Local Regulation

Generally, in the case of state regulation and administration of mineral production, there are two distinct scenarios:

- First, when the state exerts its police powers to regulate oil and gas exploration throughout the state, no matter from what type of property, either private property or public property.
- 2. Second, when the drilling occurs on state owned land or water bodies. Just for the sake of clarity, when we use the words "state-owned land or minerals" or "state-owned waterways", it's actually shorthand for "land or minerals or waterways administered by the State of Louisiana for the benefit of its citizens".

Even though these are distinct situations, they are interwoven to the extent that whether the drilling occurs on state-owned land, or privately owned land, in theory, the State is regulating or benefitting from production in its capacity as *parens patria*, in effect exercising its powers to protect and administer the resources of the State, both financially and environmentally.

Whether dealing with royalties from oil and gas production on state owned land, or protection of the environment and the natural resources of the state, the state is acting under the "Public Trust Doctrine". The Public Trust Doctrine is one of the fundamental concepts in dealing with the state - the citizens of the state own the lands and natural resources within the state's borders, and the State simply regulates the production of mineral resources, protects the land, and administers royalty revenues on behalf of all of the citizens.

Generally, in this capacity, the state is acting as a trustee for the benefit of the citizens, an idea that Louisiana has assimilated as part of the French and Spanish civilian tradition, which were themselves based on Roman law.¹ The Public Trust Doctrine not only grants the public the right to enjoy a wide variety of recognized uses of state lands, waters and resources, but also establishes the duties and responsibilities of the state when managing these public trust assets.

Louisiana is different from other states in that under La RS. 31:6, ownership of land does not include ownership of fugitive minerals, but only the right to produce these minerals.² When those minerals are produced from state-owned land, the revenues from production are allocated statewide, so even citizens in parishes where exploration is minimal or non-existent theoretically share in the benefits of state-wide production. When production occurs on private land, allocating revenue is not the primary concern of the state, but rather, protection of the resource and the environment are the major considerations.

¹ A. Yiannopoulos, Property § 65, at 120 in 2 Louisiana Civil Law Treatise (1991)

² La. R.S. 31:6

The legislature has delegates these powers and duties to the Department of Natural Resources Office of Conservation, granting it statewide reach and authority and charging it with "conserving and regulating oil, gas, and lignite resources of the state. This statutory responsibility is to regulate the exploration and production of oil, gas and other hydrocarbons and lignite; to control and allocate energy supplies and distribution; and to protect public safety and the environment from oilfield waste, including regulation of underground injection and disposal practices."³

The powers and duties of the Office of Conservation are established and outlined in Title 30 of the Louisiana Revised Statutes, which covers Minerals, Gas and Environmental Quality, and one of the first statutes in this title states that "the Waste of oil or gas as defined in this chapter is prohibited."⁴ Waste, as defined in this context, means "the inefficient, excessive, or improper use or dissipation of reservoir energy; and the location, spacing, drilling, equipping, operating, or producing of an oil or gas well in a manner which results, or tends to result, in reducing the quantity of oil or gas ultimately recoverable from a pool."⁵

The Louisiana legislature created this statewide agency with statutory authority over oil and gas exploration & production, but it also established the duty of the agency to maximize the energy resources of the state. Further, Conservation is charged with protecting the mineral resources of the state by prohibiting practices that might be effective at extracting minerals at the expense the resource itself. Like anything that generates a massive amount of revenue, the

³ Available at http://www.dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=46&ngid=4

⁴ La. R.S. 30:2

⁵ La. R.S. 30:3(1)

powers and limits of the Office of Conservation have been tested in court multiple times, with Louisiana courts almost universally affirming that Conservation has plenary authority to permit, regulate or restrict drilling within the boundaries of the State – as well as its associated environmental impacts.

The primary policy question for purposes of this presentation is this: if Conservation has the statutory duty to maximize utilization of the oil and gas resources of the state by promoting and regulating drilling, what happens when a city or parish decides they either want to restrict drilling, or don't want drilling at all in their area? As the population of the state increases, and more and more housing developments are built, sometimes abutting what has traditionally been areas of oil and gas production, which property rights will win out? On one hand, you may have a private landowner who, with a permit from Conservation, wants to produce oil and gas from his land. On the other hand, on adjoining land you may have a developer who wants to build a subdivision, and the families moving in may not want unfettered drilling in their area. What happens when a parish or a city's desire to advocate for its residents conflicts with Conservation's duty to maximize the state's oil and gas resources?

The legislature already envisioned this conflict when it enacted LA RS 30:28(F), which says: The issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit.⁶

We can look at how this has played out by examining court cases from different areas of the state:

<u>Shreveport</u>

In 2006, the Court in Energy Management Corporation v. City of Shreveport dealt with a Shreveport ordinance that attempted to prohibit drilling within a certain area to protect the City's water supply.⁷ The case concerned Cross Lake, which is the main source of water for the City of Shreveport. The actual lake itself was transferred from the State to Shreveport in 1910 by the Louisiana legislature, with an express reservation of the mineral rights underlying the lake. In addition, the State reserved the exclusive right to drill and operate wells in order to extract the minerals under the lake. However, the 1910 act authorizing the transfer of the lake also gave Shreveport the full and plenary power over the lake for the purposes of the protection and conservation of the city's water supply.⁸ In 1926 the State expanded this grant of authority to cover up to 5,000 feet of land immediately surrounding the lake, giving the city full power and authority "to adopt and enforce all needful police and sanitary ordinances and regulations for the protection of the bed and waters of Cross Lake . . . from pollution and contamination from any source and is likewise granted similar power and control over the area surrounding said lake for a distance of five thousand feet "⁹ It reiterated this grant of authority again in 1990.¹⁰

⁶ La. R.S. 30:28(F)

⁷ Energy Management Corp. v. City of Shreveport, 397 F.3d 297 (5th Cir. 2005)

⁸ See 1910 La. Acts. 31

⁹ See 1926 La. Acts. 39

¹⁰ See 1990 La. Acts 145

In 1978 Shreveport adopts a home rule charter, part of which provides that Shreveport shall have the power "[t]o make all necessary regulations to protect the water supply of the City from pollution and other damage, and to exercise full and unlimited police power over the bed and waters of Cross Lake and for a distance of five thousand feet from the meander contour line. and to pass any and all rules, regulations and ordinances deemed to be necessary for these purposes" This reiterated the grant of authority from the state in Act 39 of 1926.¹¹

Shreveport subsequently attempted to protect its water supply by adopting Ordinance 221, which attempted to be an "overall legislative scheme to regulate hazardous activities, including but not limited to oil and gas exploration and production, that do or may pose a threat to the safety of the City's water supply."¹² The ordinance prohibited any new drilling within 1,000 feet of Cross Lake, and also set up an additional regulatory scheme for permitted drilling in areas 1,000-5,000 feet from the Lake.¹³

Energy Management Company ("EMC") eventually came to acquire several State mineral leases, and rather than going to the Office of Conservation to get a drilling permit, approached Shreveport city officials to attempt to get a variance to drill within 1,000 feet of Cross Lake, which was denied by the city.¹⁴ Since EMC was a Mississippi Corporation, they then filed suit in federal district court, claiming a takings and arguing that under both the deed conveying the lake to the city and under Louisiana law, the state has the exclusive authority to regulate drilling. Despite this, the District Court held that Shreveport had the authority under Louisiana law to adopt

State vs Local Regulation

¹⁴ Id.

¹¹ Energy Mgmt. Corp. at 299.

¹² *Id.at* 300.

¹³ Id.

ordinances to protect its water supply, including those that restrict drilling around Cross Lake, and that it acted reasonably within that authority in restricting drilling within 10 feet of Cross Lake.¹⁵ . EMC then appealed to the Fifth Circuit, which noted that Shreveport's attempts to protect their water supply was not the problem. Rather, its attempts to restrict or regulate drilling in order to protect their water supply was the problem. Regulating or restricting drilling by local governments was both prempted by the state's comprehensive regulation of this area and also prohibited by statute. Conservation has the exclusive authority to regulate drilling in Louisiana, and the court noted that "In every case which has been brought to our attention involving a challenge to the authority of the LOC, its far-reaching authority has been upheld.¹⁶

Based on the comprehensive framework that Conservation had adopted in order to regulate oil and gas production, and the sweeping powers conferred by the legislature, the Fifth Circuit found that ordinance was invalid to the extent it tried to regulate or prohibit the drilling of oil and gas wells with an area of the state.¹⁷

Terrebonne Parish

In Vanguard Environmental v. Terrebonne Parish Consolidated Government, Vanguard Environmental was issued a permit from the Office of Conservation for a saltwater injection well in Terrebonne Parish.¹⁸ However, before the well was drilled, parish officials sent a letter to Vanguard stating that the location of the injection facility must conform with a parish ordinance

¹⁵ *Id. at* 301.

¹⁶ Id. at 303, citing Rollins Env't Servs. of Louisiana, Inc. v. Iberville Par. Police Jury, 371 So. 2d 1127 (La. 1979).

¹⁷ *Id.* at 306

¹⁸ Vanguard Env't, LLC v. Terrebonne Par. Consol. Gov't, 12-1998, 2013 WL 4426508, at *1 (La. Ct. App. 2013).

State vs Local Regulation requiring such facilities be set back one mile from any residential or business structure.¹⁹ Vanguard sued, and the District Court ultimately ordered a permanent injunction enjoining Terrebonne from applying any of its local regulatory ordinances to Vanguard or compelling Vanguard to comply with those ordinances.²⁰ On appeal, the First Circuit examined whether Terrebonne Parish could regulate or restrict oil field waste disposal wells or whether state law had delegated these powers solely to the Office of Conservation. Again, based on the comprehensive regulatory framework governing this area, it was clear that attempts to restrict or prohibit the location of saltwater injection wells through local ordinance were prohibited. Accordingly, the fifth Circuit affirmed the injunction against Terrebonne.²¹

St. Tammany Parish

In *St. Tammany Parish Government vs Welsh*, the Conservation granted a permit to an oil company to conduct hydraulic fracturing operations under an aquifer in Mandeville that supplied drinking water to the parish.²² St. Tammany Parish sued, asking that the Court issue an order that a declaring that the parish's "residential" zoning designation rendered the drilling illegal as being inconsistent with allowable land uses. The District Court granted summary judgment in favor of the oil company, again noting that LA RS 30:28(F) expressly preempted St. Tammany's zoning ordinances to the extent that they tried to prohibit or interfere with a valid drilling permit issued by Conservation.²³ The First Circuit agreed, noting that the legislature had created a

6/17/16), 194 So. 3d 1108, and writ denied, 2016-0650 (La. 6/17/16), 194 So. 3d 1109

¹⁹ See Terrebonne Parish Code, pt. II, ch. 11, art. III, § 11–56 ("Section 11–56").

²⁰ See Vanguard at *2.

²¹ See Vanguard at *6.

²² St. Tammany Par. Gov't v. Welsh, 15-1152 (La. App. 1 Cir. 3/9/16), 199 So. 3d 3, writ denied, 2016-0657 (La.

²³ *Id.* at 6.

comprehensive body of law that addressed literally every step of the oil and gas exploration process, from the initial exploration and drilling phases to cleanup and disposal of waste. Further, this body of law included express statutory prohibitions against local interference in the form of restrictions or prohibitions on drilling once a permit had been issued by the Office of Conservation. Affirming the District Court's grant of summary judgment, the First Circuit held that "the land use and zoning power granted to local governmental subdivisions cannot abridge the State's police power, a power that includes the Commissioner's regulation of oil and gas activity²⁴

Policy Considerations

While the courts appear to be unanimous in upholding the plenary authority of the Office of conservation in this area, this area of Louisiana law is ripe for exploration based on public policy questions. Practical considerations to take into account include examining competing interests, and in some cases, competing public policies.

Ideas to explore include:

- 1. How should we handle land use going forward as the population increases and available housing expands, sometimes abutting areas that were traditionally considered drilling areas?
- 2. What weight should competing viewpoints about the perceived hazards of mineral exploration be given, particularly in the case of controversial techniques such as hydraulic fracturing?
- 3. Who is in the best position to protect the citizens if new scientific evidence is introduced about the risks of drilling practices?

²⁴ Id. at 9.

- 4. Since the duty to maximize the resource and protect the environment require substantial scientific research and ultimately are the responsibility of the state, and some of these decisions can ultimately be characterized as a judgment call... what happens when local cities feel that Conservation's decisions might negatively impact their quality of life or put their safety at risk?
- 5. With environmental and public health and wellbeing as the primary consideration, there's no question that both the labor costs and the actual costs to research and administer exploration and production can best be met at the state level, but does that mean that parishes don't have any say in the matter?
- 6. What about a parish or city's zoning authority, which is one of its strongest tools, should these zoning decisions be given consideration by Conservation when determining where to locate wells?

While there are no clear-cut answers to these questions, the overarching idea is that the state is in the best position to protect the health, safety and general wellbeing of the citizens, while providing the resources to ensure accurate scientific and engineering research, environmental enforcement and widespread revenue allocation while protecting the underlying resource from depletion. This is not to say that the system is perfect as it is, but it's what's in place currently. There could be an argument for a cooperative process where parishes could provide input at various stages of the permitting process, or for a limited delegation of authority to parish officials or staff, within the parameters of a uniform regulatory framework in order to avoid conflicts between decisions made at the local and state level.

LOCAL REGULATION OF DRILLING

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The 69th Mineral Law Institute CLE Louisiana State University March 31-April 1, 2022

Introduction

The 2008 Haynesville Shale "boom" in Northwest Louisiana and East Texas is what brought local regulation of oil and gas drilling to the author's attention. Prior to that time, although oil and gas drilling had taken place for a hundred years or more in the Haynesville Shale area, the 2008 boom, along with the numerous lease bonuses and economic impact it brought, seemed to bring the possibility of negative drilling impacts to the attention of larger group of people than ever before.

In addition to drilling deep enough to reach the fuel, shale drilling involves the process of hydraulic fracturing, better known as "fracking". Hydraulic fracturing, "is an oil and gas well development process that typically involves injecting water, sand, and chemicals under high pressure into a bedrock formation via the well. This process is intended to create new fractures in the rock as well as increase the size, extent, and connectivity of existing fractures. Hydraulic fracturing is a well-stimulation technique used commonly in low-permeability rocks like tight sandstone, shale, and some coal beds to increase oil and/or gas flow to a well from petroleum-bearing rock formations."ⁱ

According to the United States Geological Survey, the following environmental issues that are related to hydraulic fracturing include:

- water availability
- spills of chemicals at the surface
- impacts of sand mining for use in the hydraulic fracturing process
- surface water quality degradation from waste fluid disposal
- groundwater quality degradation
- induced seismicity from the injection of waste fluids into deep disposal wells

Any kind of oil and gas drilling can additionally cause:

- reduced air quality
- noise
- night sky light pollution
- landscape changes such as forest fragmentation
- disruption to wildlife corridors and habitatsⁱⁱ

Protecting the health and welfare of its citizens from the aforementioned negative effects of drilling would seem to be something optimally handled by local government. This is

especially so, since local elected officials live and work among the parish citizens on a daily basis and arguably have many of the same concerns about these issues as their constituents. However, regulation of drilling is an area where state law specifically denies this power to the parishes.

Louisiana Laws Governing Drilling Regulation

Louisiana Revised Statute §30:28(A) and (F)

A. No well or test well may be drilled in search of minerals without first obtaining a permit from the commissioner of conservation, and the commissioner shall collect for each such well or test well a drilling permit fee. The commissioner shall periodically review the fees collected by his office for drilling permits and may revise such fees pursuant to the rulemaking provisions of the Administrative Procedure Act.

F. The issuance of the permit by the commissioner of conservation shall be sufficient authorization to the holder of the permit to enter upon the property covered by the permit and to drill in search of minerals thereon. No other agency or political subdivision of the state shall have the authority, and they are hereby expressly forbidden, to prohibit or in any way interfere with the drilling of a well or test well in search of minerals by the holder of such a permit. (*emphasis added*)

Louisiana Revised Statute §33:109.1 states, "Whenever a parish or municipal planning commission has adopted a master plan, state agencies and departments shall consider such adopted master plan before undertaking any activity or action which would affect the adopted elements of the master plan."ⁱⁱⁱ Therefore state agencies shall consider the parish's zoning regulations.

Relevant Case Law

St. Tammany Parish Government v. Welsh,^{iv} is the current primary state case addressing conflicts between local ordinances and issuance of drilling permits. In this case, the parish and an intervenor, Concerned Citizens of St. Tammany, contended that the Commissioner of Conservation issued a drilling permit in an area zoned wholly residential, in violation of its local zoning ordinance. The State prevailed in that case. Specifically, the court held,

We believe, as did the trial court, that St. Tammany Parish's zoning ordinances must yield to state law based on the language set forth in La. R.S.

30:28 F, providing that a political subdivision is "hereby expressly forbidden ... to prohibit or in any way interfere with the drilling of a well ... by the holder of ... a [duly-authorized] permit," which clearly and manifestly evinces the legislative intent to expressly preempt that area of the law. Moreover, the pervasiveness of the legislation, which addresses every aspect of oil and gas exploration as well as the need for uniformity and the danger of conflicts between the enforcement of local laws, also demonstrates the legislative intent to impliedly preempt that area of the law. *See Vanguard Environmental, LLC,* 2012–1998 at p. 4. Therefore, we hold that the St. Tammany Parish zoning ordinances are preempted by state law insofar as they affect the State's regulation of oil and gas activity. *St. Tammany at pp. 7 and 8*

The court also held that

The record establishes that in rendering his decisions (first in approving and adopting the drilling and production unit and later in issuing a drilling permit to Helis Oil), the Commissioner did, indeed, consider the provisions of St. Tammany's master plan, as set forth in the Parish's UDC. While the Parish asks this court to find that the word "consider" as used in *La. R.S. 33:109.1* means to "give heed to," we decline to do so. Applying the ordinary meaning of "consider," we conclude the record amply demonstrates that the Commissioner examined, deliberated about, pondered over, and inspected, see BLACK'S LAW DICTIONARY 306 (6th ed.1990), the provisions of the St. Tammany Parish UDC in making his decisions. As such, the provisions of *La. R.S. 33:109.1* were complied with by the Office of Conservation. *Id. at p. 12*

The two major take-aways from this case are: 1) The actions of the Office of Conservation defeat local regulations; 2) the consideration that the Office of Conservation must give to local zoning laws when issuing drilling permits is minimal.

The Louisiana Supreme Court denied writs in this case; however, three justices would have granted writs and two of those justices assigned reasons as to why they would have granted the writs.^v Interestingly, neither of the justices assigning reasons viewed the case as one easily solvable on the issue of preemption.^{vi}

An earlier case of some note is *Energy Management Corp. et al, v. City of Shreveport.*^{*vii*} However, that case involved a challenge to a municipal drilling ordinance as opposed to other types of ordinances that regulate issues normally wholly within the authority of local governments (such as zoning).

In light of the St. Tammany case, what then, are local governments to do to protect their citizens from some of the negative effects of oil and gas drilling?

Permissible Local Regulations That Affect Oil and Gas Drilling

Two areas greatly affected by drilling are noise and roads. If one looks at the definition of hydraulic fracturing, it is obvious that water, sand and chemicals have to be transported to drilling sites. Some of this transport will be done using parish roads. Additionally, as stated earlier, noise from fracking is also an issue. However, regulations of noise and road usage are two areas where local regulation has been upheld, even when it affects drilling.

For example, according to the Louisiana Attorney General's Office,

"a parish governing body has authority to regulate the use of roads and bridges within its system, R.S. 33:1236(20, 28) and R.S. 48:481, although, it may not, regulate a state road or highway. However, regulations pertaining to the parish road system cannot be arbitrary or discriminatory. *Wess-T-Erre Development v. Parish of Terrebonne, et al.*, 416 So.2d 209 (1st Cir.1982). Further, a parish governing body can set maximum roadway weight limits, *Louisiana Materials Co. v. Chronvich*, 249 So.2d 123 (La.1971), and can even require permits and bonds in connection with those limits. Attorney General Opinion No. 81-702.^{viii}

Therefore, parishes have turned to noise and road regulations in order to limit the interference of oil and gas drilling with their citizens' quality of life." Below, two examples of those type ordinances are discussed and the original ordinances are included in this writing.

Comprehensive Noise Ordinance

Both Caddo and Bossier Parishes enacted comprehensive noise ordinances within a few years after the 2008 boom in Haynesville Shale drilling. The ordinances are very similar and were written more or less jointly.

The first step was to commission a noise study. Caddo Parish and Bossier Parish were able to save money by using the same company to do studies in both parishes at the same time. The study commenced in the latter part of 2009 and was completed in the latter part of 2010-the noise ordinances were passed in 2011. What the noise study does is provide the basis for the ordinance to withstand challenges that the ordinance is arbitrary and capricious. A study conducted over a period of time shows that the governing authority has studied different sources and levels of noise, such that none are singled out, and has taken the time to thoroughly determine what levels are acceptable and why an acceptable level in a particular area should deviate from nationally accepted standards regarding noise. A study also shows what types of noises are taking place during certain times of the day and whether certain levels of noise should be restricted to certain times of day.

Key features of the ordinances passed by Caddo and Bossier Parishes are: 1.) Units of measure are clearly outlined (decibels) as well as maximum levels; 2). The method for measuring noise level is clearly outlined; 3) Types of noise receivers are defined, allowing for

some variation based on receiver; 4) There is a process to obtain a variance; 5) The ordinances do not single out the oil and gas industry. All of these features, combined with the noise study support the reasonableness of the ordinances and show that an effort has been made to use the least restrictive means of controlling noise.

Commercial Vehicle Enforcement Ordinance

Caddo Parish passed a Commercial Vehicle Enforcement Ordinance in 2010. Instead of having a study done for this ordinance, the parish chose to follow the standards promulgated by the State of Louisiana DOTD when determining what constitutes overweight vehicles on its roads. Additionally, Caddo chose to use the fee schedule from DOTD. The benefits of those decisions were: 1) saved reinventing the wheel (no pun intended); 2) vehicles coming from state roads onto parish roads could not argue that they were being subjected to differing sets of standards; 3) the state standards and fees would likely already have withstood challenges successfully.

Notes on Both Ordinances

An ordinance that cannot be enforced is of no use. Both the noise and commercial vehicle ordinances require specially trained personnel and special equipment to enforce them. Caddo Parish uses personnel from its public works department to enforce both ordinances. It can also be helpful to have persons in these positions be P.O.S.T. certified and deputized by your local sheriff.

Conclusion

In conclusion, while the regulation of oil and gas drilling is an area of state preemption, there are measures that local governments can take which offer their citizens some protection from the negative effects of oil and gas drilling. It is also not inconceivable that there may come a time that the Louisiana Supreme Court will agree to take a case like *St. Tammany* and address the preemption issue.

ⁱ United States Geological Survey, *What is Hydraulic Fractu*ring, retrieved March 17, 2022 from <u>https://www.usgs.gov/faqs/what-hydraulic-fracturing</u>

ⁱⁱ United States Geological Survey, What environmental issues are associated with hydraulic fracturing?

[,] retrieved March 17, 2022 from <u>https://www.usgs.gov/faqs/what-environmental-issues-are-associated-hydraulic-fracturing</u>

ⁱⁱⁱ LA. REV. STAT. § 33:101(1) defines a master plan as a statement of public policy for the physical development of a parish or municipality adopted by a parish or municipal planning commission.

^{iv} St. Tammany Parish Government v. Welsh, 15-1152 (La. App. 1 Cir. 3/9/16), 199 So.3d 3.

^v St. Tammany Parish Government v. Welsh, 194 So.3d 1108 (Mem), 2016-0657 (La. 6/17/16).

^{vi} Id. ^{vii} Energy Mgmt. Corp. v. City of Shreveport, 397 F.3d 297 (5th Cir. 2005).

^{viii} La. Atty. Gen. Op. No. 88-418 (Nov. 1, 1998), 1988 WL 428412
CADDO ORDINANCES FOR SAMPLE PURPOSES

(updated ordinances can be found at https://library.municode.com/la/caddo_parish/codes/code_of_ordinances)

ORDINANCE NO. 5072 of 2011

AN ORDINANCE AMENDING CHAPTER 32 OF THE CADDO PARISH CODE OF ORDINANCES BY ADDING ARTICLE VI, SECTIONS 32-20. THROUGH 32-26, PROVIDING FOR THE REGULATION OF NOISE WITHIN THE UNINCORPORATED LIMITS OF THE PARISH OF CADDO; PROVIDING FOR FINES AND PENALTIES FOR VIOLATION THEREOF; PROVIDING AN EFFECTIVE DATE, AND OTHERWISE PROVIDING WITH RESPECT THERETO.

WHEREAS excessive sound is a serious hazard to the public health and welfare, safety, and the quality of life: and

WHEREAS a substantial body of science and technology exists by which excessive sound may be substantially abated but not eliminated;

WHEREAS through a cooperative endeavor with the Bossier Parish Police Jury, the governments hired experts; conducted exhaustive sound studies; held multiple public meetings and received input from the public; and,

WHEREAS the people have a right to and should be ensured an environment free from excessive sound that

may jeopardize their health or welfare or safety or degrade the quality of life, and injury the property rights and values

of the people and Parish; and

NOW, THEREFORE, it is the policy of the Parish of Caddo to prevent excessive sound which may jeopardize the health and welfare or safety of its citizens or degrade the quality of life.

Until otherwise provided herein, this ordinance shall apply to the control of all sound originating within the

unincorporated limits of the Parish of Caddo and shall be effective April 1, 2011.

ARTICLE VI. REGULATION OF NOISE WITHIN THE UNINCORPORATED LIMITS OF THE PARISH OF CADDO.

SECTION. 32-20: DEFINITIONS

Agricultural Property – property used in cultivating the soil, producing crops (including timber), and raising livestock.

<u>A-weighted sound level</u>—the sound pressure level in decibels as measured on a sound level meter using the A-weighting network which discriminates against the lower frequencies according to a relationship approximating the auditory sensitivity of the human ear. The level is designated dBA.

<u>Ambient Sound</u>—all encompassing sound associated with a given environment composing of sound sources near and far.

<u>Background Sound</u>—all encompassing sound associated with a given environment without contributions from the source(s) of interest. It combines long-term and short-term background sound.

<u>Background Sound Level</u>—the sound level defined by the long-term background sound level in an area which excludes the noise source of interest and short-term background noise.

<u>C-weighted sound level</u>—the sound pressure level in decibels as measured on a sound level meter using the C-weighting network which is more sensitive to low-frequency sounds than the A-weighting network. C-weighting is used to assess the low-frequency content of a complex sound environment. The level is designated dBC.

<u>Construction</u>—any site preparation, assembly, erection, substantial repair, alteration, or similar action, but excluding demolition, for or of public or private rights-of-way, structures, utilities or similar property.

Daytime hours—the hours from 7:00 a.m. on one day and 10:00 p.m. the same day.

<u>Designated Protected Receiver</u>—a property that is not residential where the owner has applied for and obtained approval from the Parish to reduce the maximum permissible sound levels below those established for properties designated as other receiver. All such applications shall be acted upon by the Parish Administrator following a public hearing thereon and the sending of specific notice to the owners of all property located within five hundred feet of the proposed designated protected receiver.

<u>Decibel (dB)</u>—a unit for measuring the level of a sound, equal to 20 times the logarithm to the base 10 of the ratio of the pressure of the sound measured to the reference pressure, which is 20 micropascals (20 micronewtons per square meter).

<u>Demolition</u>—any dismantling, intentional destruction or removal of structures, utilities, public or private rightof-way surfaces, or similar property.

<u>Emergency</u>—any occurrence or set or circumstances involving actual or imminent physical trauma or property damage which demands immediate action.

<u>Emergency Signaling Device</u>—includes fire, burglar, civil defense alarm, siren, whistle, or similar device intended primarily for emergency purposes.

<u>Emergency Work</u>—any work performed for the purpose of preventing or alleviating the physical trauma or property damage threatened or caused by an emergency.

<u>Impulsive Sound</u>—a sound of short duration, usually less than two seconds, with an abrupt onset and rapid decay. Examples of sources of impulsive sound include explosions, drop forge impacts, hammering, and the discharge of firearms.

Lasting Activity—an activity that is associated with the intended long-term use of the property.

<u>Long-term background sound</u>—the background sound during a measurement period after removing the short-term background sound. It is considered to be approximately stationary during the measurement period and the sound sources captured can be described statistically over the measurement period.

<u>Muffler or Sound Dissipative Device</u>—a properly functioning system for abating the sound of escaping gasses on equipment where such a device is part of the normal configuration of the equipment.

Nighttime hours—the hours between 10:00 p.m. on one day and 7:00 a.m. the following day.

<u>Noise</u>—any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans.

Noise Control Officer (NCO)—the department having lead responsibility for this ordinance.

<u>Noise Sensitive Receiver</u>—includes, but is not limited to, a property where a school, hospital, nursing home, church, court, public library, or similar institution is located.

<u>Other Receiver</u> — all property other than residential property, agricultural property, noise sensitive receivers and designated protected receivers.

<u>Plainly Audible^[i]</u>—any sound that can be detected by a person using his or her unaided hearing faculties.

<u>Property line</u>—with respect to single occupancy properties, the line along the ground surface and its vertical extension that separates the real property owned, leased, or occupied by one person or entity from that owned, leased, or occupied by another person or entity. With respect to shared occupancy properties the term shall mean the imaginary line that represents the legal limits of occupancy of any person or entity who owns, leases, or otherwise occupies an apartment, condominium, hotel or motel room, office, or any other type of occupancy from that of other occupants.

<u>Pure Tone</u>—any sound which can be distinctly heard as a single pitch or a set of single pitches.

<u>Qualified Professional in Environmental Noise</u>—an individual who has education or training in environmental noise measurement instruments and practices and has experience in the performance of environmental noise measurements. If necessary for the purposes of this ordinance, the individual must also have experience in the assessment and mitigation of environmental noise.

<u>Receiving Property Type</u>—the property designations identified in this ordinance for the purpose of determining the maximum permissible sound levels for a regulated receiver.

<u>Receptor</u>—an occupied structure or outdoor public space (e.g. park, playground, etc.) located on a regulated receiver property.

<u>Regulated Receiver</u>—any real property designated as a residential property, designated protected receiver, noise sensitive receiver, or other receiver.

<u>Residential property</u>—any real property developed and used for human habitation that contains living facilities, including provisions for sleeping, eating, cooking, and sanitation, unless such premises are actually occupied and used primarily for purposes other than human habitation.

<u>Short-term background sound</u>—consists of one or more infrequent sound events and is relatively loud compared to the long-term background sound. The time of occurrence of these events cannot be described statistically over the full measurement period—e.g. barking dog, accelerating vehicle, aircraft flyover, etc.

<u>Significant Noise Generators (SNG)</u>—those land uses that are known or may reasonably be expected to generate noise upon adjacent properties that exceeds the limits set forth in this ordinance.

<u>Sound Level</u>—the sound pressure level obtained by the use of a sound level meter. If a frequency-weighting network is used, such as A or C, then the level shall be indicated as dBA or dBC, respectively. If a frequency weighting is not used, then the un-weighted or flat level shall be indicated as dB(Flat). Frequency-weighted networks shall comply with the American National Standards Institute specifications for sound level meters (ANSI S1.4-1983 (R2006)) or the latest approved revision thereof.

<u>Sound Level Meter</u>—an instrument which includes a microphone, amplifier, RMS detector, integrator or time averaging device, output meter, and weighting networks used to measure sound pressure levels. The instrument should meet requirements for a Type 1 or Type 2 sound level meter as specified in the American National Standards Institute specifications for sound level meters (ANSI S1.4-1983 (R2006)), or the latest approved revision thereof.

<u>Sound Pressure</u>—the instantaneous difference between the actual pressure and the average or barometric pressure of a given point in space, as produced by sound energy.

<u>Sound Pressure Level</u>—20 times the logarithm to the base 10 of the ratio of the RMS sound pressure to the reference pressure of 20 micropascals (20 micronewtons per square meter). The sound pressure level is denoted L_p or SPL and is expressed in decibels (dB).

<u>Temporary Noise Event</u>—an activity that generates noise which could impact a protected receiver and occurs over the course of up to 14 consecutive days. The use of the term "temporary" is relative to the acoustic tolerance of a noisy activity and does not speak to whether that activity is associated with the intended long-term use of the property.

<u>Temporary Activity</u>—an activity that is planned to occur for a pre-determined, finite length of time. Examples include but are not limited to construction, maintenance, and drilling of wells.

<u>Utility</u>—a business entity subject to government regulation that provides an essential commodity or service such as , but not limited to, water, electric, electric distribution, gas, gas distribution, gas transmission, gas gathering and telephone.

<u>Workover operation</u>—a term used in the oil and gas industry meaning work performed in a well after its initial completion.

SECTION 32-21: Authority Having Jurisdiction (AHJ)

- A. The noise ordinance shall be enforced by a Noise Control Officer (NCO). The requirements to be an NCO are established as follows:
 - 1. An employee of the Parish who is trained to perform noise enforcement activities.
 - 2. An employee who has received noise enforcement training. The employee must be acting within his or her designated jurisdiction and must be authorized to issue a summons in order to be considered a noise control officer.
- B. Powers—noise control officers shall have the power to:
 - 1. Coordinate the noise control activities of all departments in the Parish and cooperate with all other public bodies and agencies to the extent practicable;
 - 2. Review the actions of the Parish and advise of the effect, if any, of such actions on noise control;
 - 3. Review public and private projects, subject to mandatory review or approval by other departments or boards, for compliance with this ordinance;
 - 4. Issue permits;
 - 5. Investigate and pursue possible violations of this ordinance for sound levels which equal or exceed the sound levels set forth in Section 32-23, when measured at a receiving property located within the designated jurisdiction of the noise control officer, in accordance with Section 32-25 below; and
 - 6. Cooperate with noise control officers of adjacent municipalities in enforcing one another's noise ordinances.
 - 7. Determine if a complaint is frivolous, duplicitous, or vexatious.

SECTION 32-22: Applicability

- A. This ordinance applies to sound originating from or received at or within the property line of the following property types:
 - 1. Residential Property
 - 2. Designated Protected Receiver
 - 3. Noise Sensitive Receiver
 - 4. Other Receiver
- B. All significant noise generators permitted or initiated on or after the adoption date of this ordinance shall be subject to the regulations contained herein.
- C. A noise generator existing prior to the date of adoption of this ordinance is subject to the regulations contained herein if the actions of the noise generator constitute a new use. A significant increase in acoustic conditions at a regulated receiver constitutes a new use for the noise generator if the conditions are due to the following:
 - 1. Changes in the operation of the noise generator,
 - 2. Modifications to or addition of equipment,
 - 3. Changes to the physical layout of the noise generating property,
 - 4. Facility expansion, or
 - 5. Any action on the part of owner or operator that leads to an increase in sound level, or an increase in the frequency or number of occurrences of temporary noise events, at a regulated receiver.

A significant increase in acoustic conditions at a regulated receiver includes an increase in sound level by more than 5 dBA or an increase to the applicable levels in Table 1, whichever is greater, or an increase in frequency (or number) of occurrences.

Nothwithstanding the foregoing, a significant increase in acoustic conditions at a regulated received will not constitute a new use if caused solely by increased utilization of the noise generator, not to exceed its design or permitted capacity.

- D. For a change in designation of a receiving property type that decreases the maximum permissible sound levels at a property, the regulated levels corresponding to the new designation shall only apply to noise generators beginning operation, or which constitute new uses for existing noise generators, on or after the date of approval of the new designation. Existing noise sources associated with lasting activities at the time of the change in property type designation shall be treated as part of the background sound at the receiving property.
- E. All noise sources in existence prior to April 1, 2011 shall continue to be regulated by ordinances in effect prior to the effective date of this ordinance.

SECTION 32-23: Maximum Permissible Sound Levels^[ii]

A. No person or entity shall cause, allow, or permit the operation of any source of sound which creates a sound level that exceeds the background sound level by more than 5 dBA or the applicable levels in Table 1 at a regulated receiver, whichever is greater, when measured in accordance with Section 32-25. For compliance purposes, if the background sound level cannot be determined in accordance with Section 32-25, the levels listed in Table 1 relative to the receiving property type shall be used. For planning and permitting purposes, a noise survey is required to determine the background sound level at the nearest or most impacted property, and the survey must be conducted in accordance with Section 32-25. Once a noise survey has been reviewed and approved by the AHJ, the established background sound level will apply to all properties considered by the noise survey until another noise survey is approved by the AHJ. The sound level shall be measured at or within the receiving property line in accordance with Section 32-25.

 Table 1: Maximum permissible A-weighted sound levels (dBA) listed by receiving property type and time of day.

 Outdoor

Receiving Property Type:	Noise Sensitive Receiver		Residential or Designated Protected Receiver		Other Receiver	
Time:	7AM- 10PM	10PM- 7AM	7AM- 10PM	10PM- 7AM	7AM- 10PM	10PM- 7AM
Maximum permissible A- weighted sound level, dBA*	50	45	55	50	60	60

*maximum permissible levels are subject to Sections 32-23.B, 32-23.C, 32-23.D, and 32-23.E.

- B. A temporary noise allowance can be applied to the levels determined in Section 32-23.A. This allowance accounts for a receiver's added tolerance for known temporary noise events due to temporary activities of up to 14 days. The allowance requires that the party responsible for the noise source inform the potentially impacted recipients of the duration and nature of the noise. A temporary noise allowance can occur only once every 90 days for whatever duration of that activity consistent with the following:
 - 1. For noise events lasting one day or less, a 15 dB increase in maximum permissible A-weighted sound level is permissible.
 - 2. For noise events lasting up to 14 consecutive days, a 10 dB increase in A-weighted sound level is permissible.
 - 3. For any noise events lasting longer than 14 days, the noise associated with that temporary activity is not considered a temporary noise event.
- C. Low frequency noise limit:

- No person or entity shall cause, allow, or permit the operation of any source of sound which creates low-frequency outdoor sound levels in the 31.5 and 63 Hz octave bands that exceed 65 dB(Flat) or exceeds the background sound levels in the 31.5 and 63 Hz octave bands by more than 5 dB(Flat), whichever is greater.
- D. Impulsive noise limit:
 - 1. No person or entity shall cause, allow, or permit the operation of any source of sound which creates impulse sound levels that exceed the background sound level by 15 dBA at or within the receiving property line in accordance with the impulsive measurement requirements of Section 32-25.
- E. Tones:
 - No person or entity shall cause, allow, or permit the operation of any source of sound which creates a pure tone where the one-third (1/3) octave band sound pressure level in the band of interest exceeds the arithmetic average of the soundpressure levels for the two adjacent one-third octave bands by the corresponding decibel (dB(Flat)) values as follows:
 - a) 5 dB for center frequencies of 500 Hertz and above,
 - b) 8 dB for center frequencies between 160 and 400 Hertz, and
 - c) 15 dB for center frequencies less than or equal to 125 Hertz.
- SECTION 32-24: Exemptions and Restricted Uses

The following standards shall apply to the associated activities or sound sources below:

- A. Emergency signaling devices are exempt from Section 32-23 in the case of an emergency and the following cases:
 - Testing of an emergency signaling device shall occur between 7:00 a.m. and 7:00 p.m. Any testing shall use only the minimum cycle test time. In no case shall such test time exceed five (5) minutes. Testing of the emergency signaling system shall not occur more than once in each calendar month.
 - 2. Sounding or permitting the sounding of any exterior burglar or fire alarm or any motor vehicle burglar alarm, shall terminate within fifteen (15) minutes of activation unless an emergency exists. If a false or accidental activation of an alarm occurs more than twice in a calendar month, the owner or person responsible for the alarm shall be in violation of this section.
 - 3. Testing of an emergency signaling device in accordance with state and federal regulations.

- B. Nonemergency signaling devices operated by houses of religious worship, ice cream trucks, seasonal contribution solicitors, or by governmental entities or railroads for traffic control purposes are exempt from the operation of this provision.
- C. Operation and testing of emergency equipment and safety protection systems (for example, relief valves) are exempt from Section 32-23.
- D. Accidents and emergency responses to accidents which pose a clear and immediate danger to life, health, or significant loss of property are exempt from Section 32-23.
- E. Motor vehicles and motorcycles on traffic ways of the parish are exempt from Section 32-23 provided that:
 - 1. Vehicle horns, signaling devices, and similar devices are sounded for less than five (5) consecutive seconds or are sounded as a danger warning.
 - 2. Adequate Mufflers or Sound Dissipative Devices are properly installed such that:
 - a) No person shall operate or cause to be operated any motor vehicle or motorcycle not equipped with a muffler or other sound dissipative device in good working order and in constant operation.
 - b) No person shall remove or render inoperative, or cause to be removed or rendered inoperative, other than for purposes of maintenance, repair, or replacement, any muffler or sound dissipative device on a motor vehicle or motorcycle.
- F. No person shall repair, rebuild, modify, or test any motor vehicle, motorcycle, or motorboat in such a manner as to exceed the limits set forth in Section 32-23.
- G. Motor sports parks and recreational vehicles:
 - 1. Except as permitted in the following subsection (2), no person shall operate or cause to be operated any recreational motorized vehicle off a public right-of-way in such a manner that the sound level emitted there from exceeds the limits set forth in Section 32-23 at or across the property line when operated on private property. This ordinance shall apply to all recreational motorized vehicles, whether or not duly licensed and registered, including, but not limited to, commercial or non-commercial racing vehicles, motorcycles, go-carts, snowmobiles, amphibious craft, campers and dune buggies, but not including motorboats.
 - 2. Permits for vehicle racing events may be obtained from the AHJ after submission of a noise management plan as required.
- H. Airport and Aircraft Operations:
 - 1. The AHJ shall consult with the airport proprietor to recommend changes in airport operations to minimize any noise disturbance which the airport owner may have authority to control in its capacity as proprietor.

- 2. Nothing in this ordinance shall be construed to prohibit, restrict, penalize, enjoin or in any manner regulate the movement of aircraft which are in all respects, conducted in accordance with, or pursuant to applicable Federal Laws or regulations.
- I. Any public performance, gathering or parade for which a permit has been obtained from the parish is exempt from Section 32-23.
- J. Outdoor school and playground activities are exempt from Section 32-23. Reasonable activities conducted on public playgrounds and public or private school grounds, which are conducted in accordance with the manner in which such spaces are generally used, including but not limited to, school athletic and school entertainment events.
- K. Power Tools:
 - 1. Commercial and industrial use of power tools and landscaping and yard maintenance equipment, excluding emergency work, shall not be operated on or within 250 feet of a regulated receiver between the hours of 7:00 p.m. and 7:00 a.m. on weekdays, or between the hours of 7:00 p.m. and 9:00 a.m. on weekends or federal holidays, unless such activities can meet the limits set forth in Section 32-23. All motorized equipment used in these activities shall be operated with a muffler. At all other times, the limits set forth in Section 32-23 do not apply.
 - 2. Non-commercial or non-industrial use of power tools and landscaping and yard maintenance equipment shall not be operated between the hours of 8:00 p.m. and 8:00 a.m., unless such activities can meet the applicable limits set forth in Section 32-23. All motorized equipment used in these activities shall be operated with a muffler. At all other times, the limits set forth in Section 32-23 do not apply.
- L. Construction and demolition activity, excluding emergency work, shall not be performed between the hours of 7:00 p.m. and 7:00 a.m. on weekdays, or between the hours of 7:00 p.m. and 9:00 a.m. on weekends and federal holidays, unless such activities can meet the limits set forth in Section 32-23. All motorized equipment used in construction and demolition activity shall be operated with a muffler. At all other times, the limits set forth in Section 32-23 do not apply to construction and demolition activities.
- M. Repairs or excavations of bridges, streets or highways by or on behalf of the Parish, State of Louisiana, or the federal government, are exempt from limits set forth in Section 32-23 between the hours of 7:00 p.m. and 7:00 a.m., when public welfare and convenience renders its impractical to perform the work between 7:00 a.m. and 7:00 p.m.
- N. Any government or utility construction or maintenance activities are exempt from Section 32-23.
- O. Personal or commercial vehicular music amplification or reproduction equipment shall not be operated in such a manner that it is plainly audible at a residential property line between the hours of 10:00 p.m. and 8:00 a.m.

- P. Personal vehicular music amplification equipment shall not be operated in such a manner as to be plainly audible at a distance of 50 feet in any direction from the operator.
- Q. Self-contained, portable, hand-held music or sound amplification or reproduction equipment shall not be operated on a public space or public right-of-way in such a manner as to be plainly audible at a distance of 50 feet in any direction from the operator between the hours of 8:00 a.m. and 10:00 p.m. Between the hours of 10:00 p.m. and 8:00 a.m., sound from such equipment shall not be plainly audible by any person other than the operator.
- R. Significant Noise Generators (SNG) shall submit a Noise Management Plan (NMP) for approval by the Parish. Significant noise generators are those land uses that are known or may reasonably be expected to generate noise upon adjacent properties that exceeds the limits set forth in Section 32-23, and may include but are not limited to oil and gas industry sites (e.g. wells heads, compressor stations, refineries, etc.), motor sports parks, machine shops, industrial plants, etc.
 - 1. No SNG shall create any noise that exceeds the limits set forth in Section 32-23 subject to applicable exemptions in Section 32-24.
 - 2. Prior to the issuance of a SNG permit and the commencement of operations, the operator shall submit a noise management plan (NMP), approved by the AHJ, detailing how the equipment, structures, site plan, and proposed activities on site complies with the maximum permissible sound levels of this ordinance. Refer to the Parish's Noise Management Plan guidance document for specific information. At a minimum, the noise management plan must:
 - a) Identify operation noise impacts;
 - b) Provide documentation establishing the background sound level prior to construction. A noise survey must be conducted in accordance with Section 32-25 for the nearest or most impacted property. Once a noise survey has been reviewed and approved by the AHJ, the established background sound level will apply to all future development until another noise survey is approved by the AHJ.; and
 - c) Detail how the impacts will be mitigated. In determining noise mitigation, specific site characteristics shall be considered, including but not limited to the following:
 - Location and acoustic characteristics of all noise sources that have the potential to exceed the limits set forth in Section 32-23;
 - (2) Nature and proximity of all adjacent development, location, and type;
 - (3) Seasonal and prevailing weather patterns, including wind directions;
 - (4) Vegetative cover on or adjacent to the site; and
 - (5) Topography.
 - 3. The operator shall be responsible for verifying compliance with this ordinance and the noise management plan after the installation of the noise generation equipment.
 - 4. The sound level meter used in conducting noise evaluations shall be in accordance with Section 32-25.

- 5. Noise mitigation equipment, structures, products, and materials or other alternate methods as approved by the AHJ may be used to ensure compliance.
- 6. The AHJ may require continuous monitoring for up to 72 hours, or for such duration as the SNG is able to demonstrate is representative of the maximum sustained noise generation conditions, to ensure compliance with the noise limits of this ordinance when the SNG is in within 1,000 feet of a regulated receiver. In the event of complaints, additional measurements may be required upon notification to proceed by the AHJ. A minimum measurement period should be sufficient to ensure that the sound levels measured are typical of the source of interest but in no event should the duration of the measurement period be less than 15 minutes, unless the duration or duty cycle of the sound source under observation is less than 15 minutes. The cost of such monitoring shall be borne by the operator of the SNG.
- 7. If a complaint is received by either the operator or the Parish from any regulated receiver, the operator shall, within twenty-four (24) hours of notice of the complaint and upon notification to proceed by the AHJ, continuously monitor for up to seventy-two (72) hour period the exterior sound level generated to ensure compliance. At the request of the AHJ, the operator shall monitor the exterior sound level at the source of the complaint. A minimum measurement period should be sufficient to ensure that the sound levels measured are typical of the source of interest but in no event should the duration of the measurement period be less than 15 minutes, unless the duration or duty cycle of the sound source under observation is less than 15 minutes. The cost of such monitoring shall be borne by the operator of the SNG.
- 8. A citation may be immediately issued for a clear violation of the provisions of this ordinance. However, if the operator of the SNG is in compliance with the approved noise management plan, and a violation still occurs, the operator will be given twenty-four (24) hours from notice of non-compliance to correct the violation from an identified source before a citation is issued. Additional extensions of the twenty-four (24) hour period may be granted in the event that the source of the violation cannot be identified after reasonable diligence by the operator or if the mitigation efforts require additional time for investigation and implementation.
- S. Oil and Gas Wells—in addition to the requirements listed for Significant Noise Generators in Section 32-24.
 - 1. All workover operations shall not be performed between the hours of 7:00 p.m. and 7:00 a.m. on weekdays, or between the hours of 7:00 p.m. and 9:00 a.m. on weekends and federal holidays, unless the operator demonstrates through a NMP that such activities can meet the limits set forth in Section 32-23. Heavy vehicles associated with workover operations may not operate in residential areas between the hours of 7:00 p.m. and 7:00 a.m. on weekdays, or between the hours of 7:00 p.m. and 9:00 a.m. on weekends and federal holidays.
 - 2. The exterior sound level generated by the drilling, redrilling or other operations of all gas wells located within one thousand (1,000) feet of a regulated receiver shall be continuously monitored for up to 72 hours, or for such duration as the SNG is able to demonstrate is representative of the maximum sustained noise generation conditions, to ensure compliance with the noise limits of this ordinance. The cost

of such monitoring shall be borne by the operator. If a complaint is received by either the operator or the Parish from any regulated receiver, the operator shall, within twenty-four (24) hours of notice of the complaint and upon notification to proceed by the AHJ, continuously monitor for up to seventy-two (72) hour period the exterior sound level generated by the drilling, redrilling or other operations to ensure compliance. At the request of the complaint. A minimum measurement period should be sufficient to ensure that the sound levels measured are typical of the source of interest but in no event should the duration of the measurement period be less than 15 minutes, unless the duration or duty cycle of the sound source under observation is less than 15 minutes. The cost of such monitoring shall be borne by the operator of the SNG.

T. Loudspeakers/Public Address Systems

- 1. No person or entity shall cause, allow, or permit for any purpose any loudspeaker, public address system, or similar device that produces, reproduces, or amplifies sound, such that the sound there from exceeds the levels stated in Section 32-23 relative to the receiving property type without first obtaining a permit to do so. The permit shall be granted only for the amplification of music or human speech, or both. The permit:
 - a) May be obtained by making application to the Parish.
 - b) Requires payment of a \$10.00 fee for the administrative costs of issuing the permit or a sworn statement of inability to pay the fee.
 - c) Is valid for one 14 hour period between the hours of 8:00 a.m. and 10:00 p.m.
 - d) Shall not be issued to the same or any other person or entity for the same location more than twice during any 30 day period. In the case of a sound truck, location shall relate to the area traversed by the truck in one day.
 - e) Shall not authorize, allow, or otherwise permit the production, reproduction, or amplification of sound that exceeds 65 dBA when measured from the property line of the nearest receiving property.
 - Requires an application containing the following information:
 - (1) The date of the application and the date and hours for which the permit is requested.
 - (2) The name and address of the applicant.
 - (3) The name and address of the person who will have charge of the sound amplifying equipment.
 - (4) The purpose for which the sound equipment will be used.
 - (5) The address and a description of the location where the sound equipment will be used.
 - (6) A description of the type of sound amplifying equipment to be used.
- U. Lawful discharge of firearms.

f)

V. Permits for Variance:

- 1. Any person who owns or operates any noise source may apply to the Parish for a variance from one or more of the provisions of this ordinance.
- 2. Applications for a permit of variance shall supply information including, but not limited to:
 - a) The nature and location of the noise source for which such application is made.
 - b) The reason for which the permit of variance is requested.
 - c) The level of noise at the nearest or most impacted receiver that will occur during the period of the variance.
 - d) The section or sections of this ordinance for which the permit of variance shall apply.
 - e) A description of interim noise control measures to be taken for the applicant to minimize noise and the impacts occurring therefrom.
 - f) A specific schedule of the noise control measures that shall be taken to bring the source into compliance with this article within a reasonable time should the source continue after the variance period.
- 3. Applicants must bear the cost of a third-party review of their application by a qualified professional in environmental noise; the recommendation of the third-party review will be advisory to the Parish authority.
- 4. No variance shall be approved unless the applicant presents adequate proof that:
 - a) Sound levels occurring during the period of the variance will not constitute a danger to public health.
 - b) Compliance with the article would impose an unreasonable hardship on the applicant without equal or greater benefits to the public.
- 5. In making the determination of granting a variance, the Caddo Parish Commission shall consider the following factors:
 - a) The character and degree of injury to, or interference with, the health and welfare or the reasonable use of property that is caused or threatened to be caused.
 - b) The social and economic value of the activity for which the variance is sought.
 - c) The ability of the applicant to apply the best practical noise control measures.
- 6. If approved for a variance, the party responsible for the noise source must inform the potentially impacted recipients of the duration and nature of the noise.
- 7. If approved for a variance, the Caddo Parish Commission shall determine the duration of the permit.
- 8. A copy of the permit of variance must be kept on file by the Parish.
- 9. Failure to supply the information required by the Caddo Parish Commission shall be cause for rejection of the application.
- 10. Applications for variances of an emergency nature may be acted upon by Noise Control Officers. If granted, such variances shall not exceed thirty (30) days duration.

SECTION 32-25: Procedures for Measuring Noise

A. Testing shall be conducted in accordance with methods set forth hereinafter, and expanded in greater detail in the parish's Noise Measurement Procedures Guidance document. Alternative methods, procedures, or instruments may be used subject to approval and conditions prescribed by the AHJ. The AHJ may itself employ such alternatives when warranted by test conditions or other circumstances.

Acceptable measurement methods:

- B. Measurements shall be conducted by the NCO or other qualified professional in environmental noise in accordance with methods set forth hereinafter.
- C. Operating conditions of the noise source during the measurement will vary based on the noise source of interest. Insofar as practicable, measurements shall be conducted under representative conditions to those that initiated the investigation. Relevant operational conditions may include but are not limited to typical, design, maximum, and fluctuating conditions.
- D. If short-term background sounds increase the monitored sound levels, the measurements should be postponed until these extraneous sounds do not increase the monitored sound levels of interest or these periods of noise should be removed during post-processing of the measurement data.
- E. General requirements—the investigator shall, to the extent practicable, conduct all measurements in accordance with the following procedures and report related information:
 - 1. Identify all measurement equipment by manufacturer, model number, and serial number.
 - 2. Report the date, day of week, and time of day.
 - 3. Identify all sources contributing sound to the point of measurement—characterize and localize sound sources.
 - 4. Conduct measurements at or within the property line of any affected person or entity. Report the distance and direction to the noise source in question.
 - a) For noise due to temporary activities, measurements shall be conducted at least 10 feet from the receptor on the side of the receptor where the sound levels are most representative of the noise source in question.
 - b) For noise due to lasting activities, measurements shall be conducted at or within the property line as appropriate for the noise source in question.
 - 5. The measurement session should consist of three individual measurement periods. A minimum measurement period should be sufficient to ensure that the sound levels measured are typical of the source of interest but in no event should the duration of the measurement period be less than 5 minutes, unless the duration or duty cycle of the sound source under observation is less than 5 minutes.
 - 6. Background sound level measurements intended for the purpose of planning or permitting shall be conducted for a minimum measurement period of 3 consecutive days (72 consecutive hours) and include at least 24 hours during either Saturday or Sunday. Measurements must be processed to eliminate the contributions of short-term background sounds as identified in Section 32-25.

- 7. Calibrate the measuring device before and after each series of readings. Report calibration results.
- 8. Report environmental conditions during measurements including wind speed and direction.
- 9. Describe relevant source operational condition(s).
- 10. Outdoor sound measurements made under the following conditions shall not be used to determine compliance:
 - a) Measurements without a wind screen properly attached to the measuring device.
 - b) Measurements when the wind speed exceeds 11 miles per hour (including gusts).
 - c) Measurements under any condition which allows the measuring device to become wet, such as rain, snow, or condensation.
 - When the ambient temperature is below 14 degrees F (-10 degrees C) or above 122 degrees F (50 degrees C).
- 11. Background sound level measurement values to be reported:
 - a) For the purpose of compliance, report the A-weighted, time-interval equivalent 15 minute sound pressure level, L_{Aeq15min}, measured in accordance with Section 32-25.
 - b) For the purpose of planning or permitting, report the A-weighted, timeinterval equivalent 3 day sound pressure level, L_{Aeq3day}, after the measurements have been processed for removal of short-term background sounds and measured in accordance with Section 32-25.
- F. Measurement Instrumentation
 - 1. The sound level meter must be able to measure the continuous energy equivalent sound level of steady, intermittent, and fluctuating sources. Any instrument used for sound pressure level measurement must be able to measure A-weighted sound pressure levels with a slow, exponential time-averaging setting and meet requirements for a Type 1 sound level meter as specified in the American National Standards Institute specifications for sound level meters (ANSI S1.4-1983 (R2006)), or the latest approved revision thereof.
 - 2. To investigate impulsive noise limits, the sound level meter must be able to measure A-weighted sound pressure levels with a fast, exponential time-averaging setting.
 - 3. To investigate the presence of tonal components, the sound level meter must be able to measure 1/3 octave band sound pressure levels. The meter must meet the minimum technical specification in the American National Standards Institute (ANSI) publication S1.11-2004 or latest revision for Class 2 filter sets.
 - 4. The calibrator must meet the requirements for ANSI S1.40-2006 or latest revision.
 - 5. The sound level meter must be recalibrated at least every two years and the field calibrator must be recalibrated at least once per year by the manufacturer or by a laboratory accredited for such calibrations by either the American Association for Laboratory Accreditation or the National Institute of Standards and Technology. A copy of written documentation of such recalibration, in a form approved by the parish, shall be kept with the equipment to which it refers.

SECTION 32-26: Enforcement

- A. Any person or entity that clearly violates any provision of this ordinance shall be subject to a civil penalty for each offense of not more than \$500.00 or a term of imprisonment of 30 days. If the violation is of a continuing nature, each day during which it occurs shall constitute an additional, separate, and distinct offense. Further, the Parish may enforce this ordinance through all civil remedies available, including, but not limited to, injunctive relief.
- B. No provision of this ordinance shall be construed to impair any common law or statutory cause of action, or legal remedy there from, of any person for injury or damage arising from any violation of this ordinance or from other law.

IT IS FURTHER ORDAINED, that if any provision or item of this ordinance or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications which can be given effect without the invalid provisions, items or applications, and to this end, the provisions of this ordinance are hereby declared severable.

BE IT FURTHER ORDAINED, that this ordinance shall take effect on

April 1, 2011.

BE IT FURTHER ORDAINED, that all ordinances or parts thereof in conflict herewith are hereby repealed.

Approved as to legal form:

Office Of The Parish Attorney

Date

^[1] "Plainly Audible" is a standard used in multiple United States jurisdictions. (See State v. Ewing, 81 Hawaii 156, 914 P.2d 549 (App. 1996)) The standard has been held as neither vague nor overbroad and provides a clear understanding to those it regulates.

^[ii] Maximum Permissible Sound Level

The predetermined levels are defined by the receiving property type. The levels in Table 1 are based on the World Health Organization's *Guidelines for Community Noise* (1999) in conjunction with analysis of onsite measurements conducted throughout the parish.

ORDINANCE NO. 4967 OF 2010

AN ORDINANCE AMENDING CHAPTER 14 OF THE CODE OF ORDINANCES BY ADDING ARTICLE V COMPRISED OF SECTION 14-111 -14-126 "COMMERCIAL VEHICLE ENFORCEMENT", AND PROVIDING FOR THE ESTABLISHMENT OF REASONABLE AND UNIFORM SUPPLEMENTAL ROAD AND BRIDGE USE REGULATIONS FOR THE PARISH OF CADDO; FINES AND PENALTIES FOR VIOLATION THEREOF, AND OTHERWISE PROVIDING WITH RESPECT THERETO.

WHEREAS, the growth and volume of heavy industrial uses and other uses of the public road and bridge system in the Parish of Caddo (the "System") is hereby declared to possess such importance to the health, safety, and general welfare of the citizens of the Parish of Caddo that the establishment of reasonable and uniform supplemental road and bridge use regulations is essential in order to avoid the creation of hazards in the System, and to protect the long term investment of Parish tax dollars in its Roads and Bridge; and

WHEREAS, these regulations are intended to coexist without conflict with either state regulation and laws, any legal responsibilities of local governments under relevant state and federal laws, any federal statutes or regulations, or with other local regulations which already may address any subject matter of this ordinance; and

WHEREAS, the Parish has discovered that this increased volume of heavy industrial uses of the System has caused significant damage, and costs Caddo millions of dollars in lost intended wear life and actual destruction to the System; and

WHEREAS, various studies have shown, including studies by the U.S. Department of Transportation and various state governments of transportation, that a commercial motor vehicle weight enforcement program helps avoid pavement damage from overweight vehicles.

WHEREAS, the Louisiana Department of Transportation has adopted a civil fine schedule for overweight traffic on roads designed to measure and compensate the State for overweight offenders damage to its own road and bridge systems; and

WHEREAS, the Parish of Caddo intends to adopt the same civil fine schedule of the Louisiana Department of Transportation to attempt to recoup the loss to the public fisc by the operation of the over-weight traffic on the System;

NOW, THEREFORE, BE IT ORDAINED by the Caddo Parish Commission that the Chapter 14, of the Caddo Parish Code of Ordinances, be and is hereby amended to add Article V composed of Section 14-111 – 14-111.7 "Commercial Vehicle Enforcement" and the following road and bridge use regulations are adopted for the Parish of Caddo:

Article V, Section 14-111. Commercial Vehicle Enforcement

SECTION 1. DEFINITIONS:

CADDO PARISH:

Caddo Police Commercial Vehicle Enforcement Unit

AXLE:

A beam with a spindle or spindles about which wheels rotate.

AXLE GROUP:

A combination of two or more consecutive axles considered together in determining their combined load effect on a highway (such as tandem, tridum, or quadrum axle groups).

BOOSTER:

A mechanism which attaches additional axles to the rear of a trailer. The trailer to booster connection may rely on mechanical, air (or other gas), or hydraulic means to provide load transfer. Generally designed to provide axle spacing between groups of a minimum of ten (10) feet bridge or greater. (Also called axle extensions or stingers.)

CONVERTER DOLLY:

An auxiliary undercarriage assembly consisting of a chassis, fifth wheel and towbar used to convert a semitrailer to a full trailer. (No load distribution occurs between dolly & power unit.)

DECK:

The load carrying area on a platform, lowbed or chassis-type trailer. Can be flat level, dropside, recessed well (transformer) or beam design.

DEPARTMENT:

Caddo Parish Commercial Vehicle Enforcement Unit

DOLLY, JEEP:

A short frame-type trailer complete with upper coupler, fifth wheel and undercarriage assembly and designed in such a manner that when coupled to a semi-trailer and tractor it carries a portion of the trailer kingpin load while transferring the remainder to the tractor fifth wheel. (Also called joe dog or a load divider dolly; usually as a sliding fifth wheel or a fixed fifth wheel for the trailer to couple with.)

DESIGNATED TRUCK ROUTES: (National Network-NN)

Highways designated by the Secretary of the U.S. Department of Transportation in accordance with the Surface Transportation Assistance Act of 1482 that includes provisions for truck-semi trailer-trailer combinations and maximum vehicle width of eight feet six inches.

DOMICILE:

The fixed, permanent and principal residence for legal purposes.

DROMEDARY UNIT:

A load carrying compartment on a truck-tractor located between the cab and fifth wheel.

DUMMY AXLE:

A single axle attached independently to the frame of a vehicle and so designed and placed as to indicate the appearance of and to carry a uniformly distributed load of a normal axle group.

ENVELOPE VEHICLE:

A truck/semi-trailer combination or truck tractor/manufactured housing combination that does not exceed the size and weight limits specified by Caddo Parish.

GROSS VEHICLE WEIGHT RATING (GVWR):

The maximum allowable total weight of a road vehicle or trailer when loaded.

GROSS WEIGHT (GW):

The weight of a vehicle and/or combination of vehicles plus the weight of any thereon.

INDIVIDUAL AXLE:

Any of the two, three, or four axles which make up the tandem, tridum, or quadrum axle groups.

INTERSTATE HAULING:

Vehicle movement between or through two or more jurisdictions.

INTRASTATE HAULING:

Movement of a vehicle from one point within a jurisdiction to another point within the same jurisdiction, regardless of routes traversed.

JEEP:

A short frame-type trailer complete with upper coupler, fifth wheel and undercarriage assembly and designed in such a manner that when coupled to a semi-trailer and tractor it carries a portion of the trailer kingpin load while transferring the remainder to the tractor fifth wheel. (Also called joe dog or a load divider dolly; usually as a sliding fifth wheel or a fixed fifth wheel for the trailer to couple with.)

LADOTD:

The Louisiana Department of Transportation and Development.

LENGTH:

The total longitudinal dimension of a single vehicle, a trailer, or a semi-trailer. Length of a trailer or semi-trailer is measured from the point of the cargo-carrying unit to its rear and includes load-holding devices thereon.

MOBILE HOME:

(a) A trailer or semi-trailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on highways: or (b) A trailer or semi-trailer whose chassis and exterior shell is designed and constructed for use as a mobile home, as defined in (a), but which is used instead permanently or temporarily for the advertising, sales, display or promotion of merchandise or services, or for any other commercial purpose except the transportation of property for hire or the transportation of property for distribution by a private carrier.

QUADRUM AXLE:

Any four consecutive axles whose centers are 40 or more inches but not more than 96 inches apart. A quadrum axle must be designed to equalize the load between the axles.

SINGLE AXLE:

Any single axle or any assembly of two or more axles whose containers are less than 40 inches apart.

SEMI-TRAILER:

Any single vehicle without motive power designed for carrying property and passengers and so designed in conjunction and used with a motor vehicle that some part of its weight and that of its own load rests or is carried by another vehicle and having one or more load-carrying axles.

STINGER-STEERED COMBINATION:

A truck tractor semi trailer wherein the fifth wheel is located on a drop frame located behind and below the rear-most axles of the power unit.

TANDEM AXLE:

Any two consecutive axles whose centers are 40 or more inches but not more than 96 inches apart. A tandem axle must be designed to equalize the load between the axles.

TRIDUM AXLE:

Any three consecutive axles whose centers are 40 or more inches but not more than 96 inches apart. A tridum axle must be designed to equalize the load between the axles.

TRAILER:

Any single vehicle without motive power designed for carrying property and passengers wholly on its own structure, drawn by a motor vehicle, which carries no part of the weight and load of the trailer on its own wheels, and having two or more load carrying axles.

TRAILER DOLLY:

An auxiliary undercarriage assembly consisting of a chassis, fifth wheel and towbar used to convert semi-trailer to a full trailer.

TRAILER, DROP CENTER (DOUBLE DROP):

A trailer design employing an offset or drop in the cargo deck immediately behind the supports and another immediately in front of the suspension, the purpose of which is to lower the cargo deck and/or to provide the greatest height possible for the cargo in the dropped area.

TRAILER, DROP FRAME:

A trailer design employing one offset or drop in the cargo deck immediately behind the supports. (Also called a single drop trailer.)

TRUNION AXLE:

An axle configuration with two individual axles mounted in the same transverse plane, with four tires on each axle, connected at a pivot which allows each individual axle to oscillate in a vertical plane to provide constant and equal weight distribution on each individual axle.

TRUNION AXLE GROUP:

Two or more consecutive trunion axles, which are individually attached to, and/or articulated, from the vehicle by a weight equalizing suspension system.

VARIABLE LOAD SUSPENSION AXLES:

Axles which can be regulated by the driver of the vehicle either through the use of an in-cab valve or switch or by turning a valve on the outside of the truck. These axles are controlled by hydraulic and air suspension systems, mechanically, or by a combination of these methods.

VEHICLE:

Any device by which a person, or things may be transported upon a public highway or bridge. A trailer or semi-trailer shall be a separate vehicle. For the purposes of this Article V such vehicles or a combination of vehicles operating intrastate with a single or combined Gross Vehicle Weight Rating equal to or greater than 20,001 pounds; or a vehicle or combination of vehicles operating interstate with a single or combination of vehicles operating interstate with a single or combination of vehicles operating interstate with a single or combination of vehicles operating interstate with a single or combined Gross Vehicle Weight Rating equal to or greater than 10,001 pounds; or any vehicle that is used in transporting material found by the U. S. Secretary of Transportation to be hazardous.

WIDTH:

The total outside transverse dimension of a vehicle including any load or load holding devices thereon, but, excluding approved safety devices and tire bulge due to load.

SECTION 14-112.

Article 14-112. Width; projecting loads.

- A. The width of any vehicle shall not exceed 102 inches, exclusive of safety devices.
- B. The load of any vehicle shall not project more than 12 inches beyond the width of the vehicle.

SECTION 14-113. Height

A. The height of any vehicle and its load shall not exceed 13 feet 6 inches on the roadways maintained by Caddo. Vehicles operating exclusively on Interstate Highway (due to their configuration) will have a oneroad mile exclusionary zone from the Interstate Highway to allow for access to terminals, facilities for food, fuel, repairs, and rest.

SECTION 14.114. Length

- A. On roadways maintained by Caddo the length of a single vehicle shall not exceed 45 feet. The length of the semi trailer portion of a tractor-semi trailer combination shall not exceed 59 feet 6 inches maximum. The maximum length for specialized hauling equipment (car haulers, boat haulers, dromedary units) is 75 feet non-inclusive of a 3-foot front overhang and a 4-foot rear overhang.
- B. The load carried by a combination of vehicles transporting poles and piling and forest products in their natural state shall not exceed 65 feet plus 1 foot for slippage of cargo. These loads may operate during daylight hours with 20 foot rear overhang plus 1 foot for slippage and two red flags (1 foot by 1 foot) posted on rearmost portion of load, indicating both the width and length of the load; and at night with 15 foot rear overhang plus 1 foot for slippage and a single steady illuminated red lamp posted at rearmost portion of load. These loads must maintain a 2-foot clearance above the pavement structure. Daylight shall be defined as the period from thirty minutes after sunrise until thirty minutes before sunset.
- C. The load upon any single vehicle or upon the front vehicle of a combination of vehicles shall not project more than 4 feet beyond the foremost part of said vehicle, and the load upon the rear of any single vehicle or upon the rearmost part of a combination of vehicles shall not project more than 8 feet beyond rearmost portion of vehicle (excluding forest products). Equipment that is more than 6 feet off of pavement surface is not considered overhang when it is to the foremost part of vehicle.
- D. No combination of commercial motor vehicles operated on Caddo roadways shall consist of more than 2 vehicles.

SECTION 14.115. Cargo Securement

- A. The load on a vehicle shall not drop, sift, leak, or otherwise escape there from.
- B. Cargo securement is product specific and will be secured accordingly.
- C. All loose material will be covered with a tarp that does not allow the load from spilling or dropping from the vehicle. This includes dirt, sand, gravel, nails or other material that is capable of blowing or spilling from a vehicle as a result of movement or exposure to air, wind currents, or weather, but shall not include agricultural products in their natural state or wood chips.

SECTION 14.116. Trailer Connections

A. Draw bars and other connections must be strong enough to pull all the towed weight, maintained properly, and shall not exceed 15 feet in length.

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SECTION 14.117. Exemptions

A. Farm and agricultural vehicles, and equipment, except draglines, and bulldozers, being operated or transported for bona fide agricultural or agronomical/horticultural purposes or the transportation of farm vehicles and equipment to be used for normal farm purposes by persons transporting such farm equipment, landscaping, hardware store delivery operations or any type of agronomical machinery, fertilizing tending units for a distance not to exceed 50 miles from point of origin, shall be exempted from Section 14-112 – 14-115.

- B. Trailers and semi trailers with a gross vehicle weight rating of not more than twelve thousand pounds, when owned and used by a retail business in this state and designed for the purpose of pick-up and delivery of new, used and repaired farm equipment for a distance not to exceed 50 miles from point of origin shall be exempt from Section 14-112.
- C. Vehicles being operated to transport timber cutting or logging equipment from one job site to another and the equipment being transported, when the trailer upon which the equipment is being towed, are owned or leased by the same person, shall be exempt from Sections 14-112, 14-113 and 14-114.
- D. Such farm vehicles and vehicles transporting cutting and logging equipment may use any Caddo road during the period from thirty minutes after sunrise until thirty minutes before sunset provided that such machinery or equipment shall be equipped with front and rear reflector lights and with a blinking hazard light clearly visible from the front and rear during dusk/dawn and properly marked with flags during daylight.
- E. Trucks which transport seed cotton modules or cotton from the field to the gin, or cottonseed from the gin to the mill shall be exempt from Sections 14-112, 14-113 and 14-114.

The first violation of any of the above articles shall be punishable by a civil fine of not more than \$175.00. A subsequent violation shall be punishable by a fine of not more than \$500.00, as defined by the Director of Public Works.

Section 14-118. Weights allowed on Caddo Roadways

- A. The total gross weight of a type 6 vehicle is 80,000 lbs. The total gross weight for a type 8 vehicle is 88,000 lbs (this includes all type 8 vehicles and any tractor with 3 or more axles pulling a trailer with 3 or more axles that are all properly rated).
- B. No tire mounted on any axle attached to any vehicle or combination of vehicles shall impose a greater weight on the surface of a roadway than 650 pounds per square inch. No tire shall exceed its manufacturers tire rating.
- C. The total gross weight of any single axle attached to any vehicle and equipped with low-pressure pneumatic tires shall not exceed 22,000 lbs.
- D. The total gross weight of any tandem axle attached to any vehicle and equipped with low-pressure pneumatic tires is 37,000 lbs., however any vehicle carrying forest products in their natural state shall be given 40,000 lbs.
- E. The total gross weight for tridum axles attached to a vehicle and equipped with low-pressure pneumatic tires is 45,000 lbs.
- F. The total gross weight for a quadrum axle attached to a vehicle equipped with low-pressure tires is 55,000 lbs.
- G. The total gross weight for a 5-axle group attached to a vehicle equipped with low-pressure tires is 61,000 lbs.
- H. The gross steering axle gross weight of any vehicle shall be determined by the size of the tire, it shall not exceed 22,000 lbs.
- I. When by reason of the condition of the weather, or the physical condition of any Caddo roadway or its recent construction, or the making of repairs thereto, Caddo Parish deems it necessary, then for such time as is reasonably necessary to remedy the situation, it may prohibit the use of such a highway or specify lesser gross weights than those fixed in this section, pursuant to the recommendations of the Director of Public Works for Caddo Parish in order to protect the public roadways and the persons and property of the traveling public from unnecessary damage. Notice of such restrictions, prohibitions, or weight reductions shall be given by Caddo Parish by proper posting of signs giving notice of these restrictions, prohibitions, or reductions at the terminal of the roadway. These roadways and bridges will be posted with regulatory weight limit signs (black lettering on a white background). Violation tickets will be issued for vehicles crossing these bridges in excess of the posted weight limit. Neither the Parish of Caddo, the Caddo Parish Commission, its officers, agents and employees shall incur any liability from

injury or property damage caused by the crossing of a posted bridge or travel on a roadway with a load/vehicle in excess of posted or advisory (black lettering on a yellow background) weight limits.

J. Caddo Parish requires reasonable distribution of axel weight on tandem, tridum, quandrum axle groups.

Tandem axles – a tandem axle group is properly distributed if neither of the axles carries more than 21,500 lbs.

Tridum axle – a tridum axle group is properly distributed if none of the individual axles carries more than 17,000 lbs.

Quadrum axles – a quadrum axle group is properly distributed if none of the individual axles carries more than 15,500 lbs.

Those vehicles and loads with permits that exceed the legal axle weight must comply with the axle weight distribution described in the overweight permit procedures.

The regulator that controls the pressure for these axles must be mounted outside the cab. The only control that may be in the cab is that which is necessary to activate the system (raise and lower the axle).

Section 14-118. Permits

- A. No vehicle or combination of vehicles which does not meet the requirements of Section 14-112 through Section 14-117 shall use the public roadways of Caddo Parish without first obtaining a special permit from the Parish, the special permit herein provided shall be issued at the discretion of Caddo Parish. Any special permit shall be carried with the vehicle using the same and shall be available for inspection by the proper authorities. There shall be a penalty for failure to obtain and/or posses required special permits of not less than \$100.00 or more than \$500.00, as prescribed by the Director of Public Works.
- B. Caddo Parish may adopt rules and regulations necessary to carry out the purpose of this section relating to special permits.
- C. The Director of Public Works may issue a special permit for the operation of vehicles or combination of vehicles having dimensions or weight in excess of the limits imposed by Caddo Parish Section 14-112 through 14-117 if the shipment is not readily divided, broken, or dismantled, or the operation of such vehicle is otherwise prohibited by law, however, if the parts which have been divided, broken, or dismantled from the shipment weight in the aggregate weight of five hundred pounds, or less, then the shipment shall be considered as indivisible. If any parts remain with the shipment weight and exceed five hundred pounds, the load shall be considered as divisible and no special permit shall be granted, and any existing special permit shall be deemed void. In the exercise of its discretion, the Director of Public Works shall consider the following factors, as well as any other circumstance existing in the particular case:
 - 1. There is a vital and exceptional economic necessity therefor.
 - 2. The existence of a real necessity of transportation by Parish roadways.
 - 3. The Director of Public Works considers the best interest of Caddo Parish, the Caddo road system and the citizens of Caddo and their property during the issuance of the permit.
- D. When an application for a special permit is made, the Director of Public Works may require the special permit applicant to supply any information it deems necessary for the protection of the interests of Caddo, the Caddo road system, and the public.
- E. The Director of Public Works may impose conditions upon the issuance of special permit and may also impose requirements upon its use, including but not restricted to, the use of additional axles, so as to require that the axle weight conform as close as possible to the weight provided for in Section 14-118; the routing over the roadways of the shipment under special permit; the date, time of day, the speed limit; the furnishing of a bond with good and solvent surety to protect Caddo Parish, and all officers and employees of Caddo Parish from all liability and damage resulting from the use of such permit (overweight -exceeding

weights allowed for the axle configuration, or 14 feet wide or more, the minimum amount of the certificate of insurance must be \$100,000 for one (1) trip or \$250,000 for a year); The permittee accepts and uses the special permit at his or her own risk, even though all instructions, directions and requirements of Caddo Parish have been followed. Neither the Parish of Caddo nor the Caddo Parish Commission or its employees and agents shall incur any liability of any nature from the use of a special permit. The accompaniment of the vehicle and shipment by proper escort, all at the expense of the permittee; and such other conditions or requirements as the Director of Public Works deems necessary and proper. When law enforcement vehicles are required as a proper escort, there shall be a charge for the use thereof. Such charges shall be based on the mileage of the escort with a minimum charge of twenty-five dollars.

- F. An overweight special permit shall be issued for the gross weight of the vehicle or combination of vehicles. Vehicles must be registered for the maximum allowable licensed weight in order to obtain an overweight special permit.
- G. The Director of Public Works may issue an annual special permit for the operation of those vehicles which are of such design that they do not comply with Section 14-117.
- H. Special permits must be obtained before movement of an oversize or overweight vehicle or load begins or before the vehicle enters upon the roadways of Caddo Parish. Movement of overweight permitted loads onto a road or bridge with a posted weight limit shall be considered on an individual basis. Inquires should be directed to the Director of Public Works well in advance of the movement as it may require analysis and adequate time should be allowed for this analysis. The permittee shall pay any cost incurred for the analysis.
- I. Caddo Parish may establish and collect reasonable fees for each special permit issued. Permit fees shall be uniform for each classification of vehicle and/or purpose for which issued. All of the funds/fees collected shall be deposited into an account designated by Caddo Parish following their collection. Caddo Parish shall keep a set of books showing from whom funds are received and for what purpose.
- J. The Director of Public Works shall recognize and honor any legally obtained LADOTD issued annual special permit. The permittee accepts and uses the special permit at his or her own risk, even though all instructions, directions and requirements of Caddo Parish have been followed. Neither the Parish of Caddo nor the Caddo Parish Commission or its employees shall incur any liability of any nature from the use of a special permit. Any special permit shall be carried with the vehicle using the same and shall be available for inspection by the proper authorities. Vehicles using an LADOTD issued annual special permit shall be prohibited from violating any posted weight limits on parish roadways or bridges without first contacting the Director of Public Works for permission with adequate response time allowed. Violation of these terms and conditions shall result in termination of observance of said permit by the Director of Public Works.

Section 14-119. Annual Permits.

A. Annual Overweight Permit for Machinery/Heavy Equipment. (\$1,500.00 per year)

The Director of Public Works may issue special permits upon application and payment of fees by the owner or operator of any vehicle or combination of vehicles transporting heavy equipment with gross vehicle weight not to exceed 120,000 lbs. Oversize dimensions not exceeding 14 feet 4 inches in height, 12 feet 0 inches in width, 90 feet 0 inches in length and a rear overhang of 25 feet 0 inches shall be included in the cost of the permit. Loads with dimensions exceeding the parameters of this permit must obtain a separate oversize/overweight permit. Vehicles using this permit are prohibited from crossing bridges with a posted weight limit and from travel in restricted construction zones. Vertical clearances will be the responsibility of the permittee. This is a calendar year permit and it expires each year on December 31. The permit will be issued for the pulling unit and is non-transferable and non-refundable. Loads with a gross vehicle weight exceeding 108,000 lbs are required to have a combination of at least 6 axles. Vehicles with valid permit are not prohibited from traveling at night, during moderate rain, or on holidays, if the width and length conform to legal standards. The issuance of this permit requires a signed agreement, an application from the company, Power Of Attorney giving authority to a person to execute the agreement on behalf of the corporation and must be dated on or before the agreement is dated. This permit shall be embossed with the Seal of the Caddo Parish and the original permit shall be carried in the vehicle for which it was issued. They may only be obtained from Caddo Parish. Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid oversize/overweight permit issued by the LADOTD.

B. Off-Road Equipment-Annual (\$1,000.00 a year)

The Director of Public Works may issue special permits upon application and payment of fees by the owner or operator of vehicles that are classified as Off-Road equipment. In general, included in this category are vehicles that have single-single, single-tandem, or tandem-tandem configurations that do not exceed 30,000 lbs on a single axle, 60,000 lbs on a tandem axle and 66,000 lbs on tridum axles. Reasonable oversize dimensions will be covered as well; however appropriate escort regulations will apply. This permit shall not supersede any lesser weight limit posted on a bridge or roadway. This is a calendar year permit and it expires each year on December 31. Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid off-road equipment annual permit issued by the LADOTD.

C. Harvest Season or Natural Forest Products (\$10.00 per year)

Upon application and payment of fees by the owner or operator of any vehicle or combination of vehicles transporting farm and forest products in their natural state, transporting seed cotton modules, transporting cotton seed from the gin to the mill, transporting brewers grain, Director of Public Works shall issue special harvest season permits for transportation of these farm and forest products in their natural state on Caddo roadways for a total gross weight of 86,600 lbs for any vehicle or combination of vehicles provided:

1-The total weight of any single axle shall not exceed 22,000 lbs.

2- The total gross weight of any tandem axle shall not exceed 40,000 lbs.

This is a calendar year permit, expiring each year on December 31.

Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid harvest season or natural forest products annual permit issued by the LADOTD.

D. Agronomical/Horticultural Permit (\$100.00 per year)

Upon application and payment of fees by the owner or operator of any vehicle or combination of vehicles hauling agronomic or horticultural crops in their natural state, have a minimum of 18 wheels, are legal in size and exceed axle group or gross vehicle weights Director of Public Works shall issue a special permit authorizing the vehicle or combination of vehicles to operate on Caddo roadways provided:

- 1-Gross vehicle weight does not exceed 100,000 lbs.
- 2-Steering axle weight does not exceed 12,000 lbs.
- 3-Tandem axle weight does not exceed 48,000 lbs.
- 4-Tridum axle weight does not exceed 60,000 lbs.

This permit shall not supersede any lesser weight limit posted bridge or roadway. This vehicle or combination of vehicles may operate at night during moderate rain and holidays. This permit is a calendar year permit, expiring each year on December 31. Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid agronomical/horticultural annual permit issued by the LADOTD.

E. Solid Waste Permit (\$50.00 per year)

Upon application and payment of fees by the owner or operator of any truck fitted with a compactor body which is engaged in the collecting and hauling of solid waste including residential solid waste, agricultural waste, commercial solid waste, construction or demolition debris, garbage, industrial solid waste, trash, white goods, wood waste, and yard trash as defined by the DEQ rules and regulations, the Director of Public Works shall issue a special permit authorizing said single vehicle with tandem axles to operate on Caddo roadways at a total gross weight not to exceed 68,000 lbs provided:

1-Steering axle does not exceed 20,000 lbs

2-Tandem axles does not exceed 48,000 lbs

Said single vehicle with tridum axles to operate on Caddo roadways at a total gross weight not to exceed 80,000 lbs provided:

- 1- Steering axle does not exceed 20,000 lbs.
- 2- Tridum axle does not exceed 60,000 lbs.

This permit shall not supersede any lesser weight limit posted on a bridge or roadway. Vehicles with a valid solid waste permit are not prohibited from traveling at night, during moderate rain, or on holidays. This is a calendar year permit and expires each year on December 31. Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid solid waste annual permit issued by the LADOTD.

F. Oversize Permit (\$250.00)

Upon application and payment of fees, the owner or operator of a vehicle or combination of vehicles shall be issued by the Director of Public Works, a special permit for vehicles and loads which exceed the legal limitations on width, height, or length or projecting loads but not to exceed legal weight limitations. These vehicles and loads may not exceed 90 feet in length, 12 feet in width, 25 feet rear overhang or 14 feet 4 inches in height. If the load being transported does not project beyond the boundaries of the vehicle, and the width and length of the load and vehicle do not exceed legal limitations, then movement will be granted in moderate rain, and holidays. This is a calendar year permit and expires each year on December 31.

In general, oversize and overweight permits are issued only for indivisible vehicles and loads. Indivisible vehicles loads are those which cannot be easily divided or broken down or dismantled to conform to the legal weight limitations or by being in their natural state may be hauled in greater bulk due to its vital and exceptional economic necessity. No type of permit issued by Caddo Parish shall supersede any lesser weight limit posted on a bridge or roadway. The traveling configuration of each piece of equipment will be subject to the initial approval of the Director of Public Works. The proposed route for each permit will be subject to the approval of Caddo Parish relative to the operation of the Caddo maintained roadway system. Restrictions will be specified on each permit; failure to comply with any of these conditions will result in a penalty being assessed. If any owner or operator of a vehicle or combination of vehicles fails to follow the adopted policies, procedures (falsify dimensions/weights to circumvent, restrictions, and/or conditions) they shall be fined. Continued disregard of the policies and procedures set forth by Caddo Parish restricting said owner/operator from operating on roadways maintained by Caddo. Notwithstanding anything contained herein to the contrary, there will be no charge for this permit if the vehicle is the subject of a current valid oversize annual permit issued by the LADOTD.

G. Oversize Special Permit (\$10.00 per movement)

Upon application and payment of fees, an owner or driver of a vehicle or combination of vehicles may be issued a special oversize permit to allow the envelope vehicle to exceed the legal limits set forth in Section 14-112, 14-113 and 14-114 at a cost of \$10.00 per movement. All conditions of the movement of these loads shall be prescribed by the Director of Public Works. These permits will be valid for the number of days that are requested (at \$10.00 a day). Movement shall be restricted to daylight hours (the period of time from 30 minutes after sunrise until 30 minutes before sunset). All regulations concerning the flagging and marking of load that exceed legal dimensions as set forth by Caddo Parish (the industry standard) shall be applied.

Section 14-120. OVERWEIGHT PERMIT PROCEDURES

Maximum Permit Weights Allowed

- A. Off Road Equipment.
- (1) Each Single axle 30,000 lbs

(2) Each Tandem axle 60,000 lbs-Any vehicle with a tandem axle weighing over 48,000 lbs must have removed all counterweights, footing plates, spreader bars and other easily removable components.

(3) Each Tridum axle 66,000 lbs-Any vehicle with a tridum axle weighing over 60,000 lbs must have removed all counterweights, footing plates, spreader bars and other easily removable components. The maximum gross weight that will be permitted for off road equipment is 212,000 lbs.

- B. All Other Vehicles
- (1) Each Single Axle

1-24,000 lbs if the gross vehicle weight is 120,000 lbs or less

2-20,000 lbs if the gross weight exceeds 120,000 lbs.

- (2) Each Tandem axle group
 1-48,000 lbs if the gross vehicle weight is 120,000 lbs or less
 2-40,000 lbs if the gross weight exceeds 120,000 lbs.
 3-45,000 if the gross weight exceeds 120,000 lbs and the spread between the axle groups is a minimum of 12 feet and the spread between tires in a group is a minimum of 4 feet.
 4-54,000 lbs if it is a set of trunion axles with a minimum of 16 tires
- (3) Each Tridum axle group 60,000 lbs.
- (4) Each Quadrum axle group 80,000 lbs.
- (5) Each 5 axle group 100,000 lbs.

When the gross weight exceeds 254,000 lbs, permit request will require detailed information. Inquiries should be directed to Caddo Parish well in advance of the movement (generally 2 weeks). Loads exceeding 254,000 lbs may require analysis from an independent engineering firm and additional time should be allowed for that analysis. The permittee shall incur any analysis expenses.

Overweight Permit Fee Schedule

Gross Weight	Distance ir	n miles
In pounds	50	100
80,000-100,000	\$30	\$45
100,100-108,000	\$50	\$95
108,100-120,000	\$70	\$130
120,001-132,000	\$90	\$170
132,001-152,000	\$120	\$225
152,001-172,000	\$155	\$295
172,001-142,000	\$140	\$365
142,000-212,000	\$225	\$435
212,001-232,000	\$260	\$505
232.000-254.000	\$295	\$575

Over 254,000:

1-\$10.00-plus \$0.50 per ton-mile in excess of 80,000 lbs, plus a fee for structural evaluation based on the following schedule:

- (1) \$125.00 for evaluation of treated timber, concrete slab, and precast concrete slab bridges
- (2) \$850.00 for evaluation of truss, continuous span bridges
- (3) \$500.00 for all other structures

All special permits are non refundable. Once the permits are issued they will not be rescinded. A special permit may be revised due to inclement weather or mechanical breakdown. Each revision will be taken on a case-by-case basis.

C. Escorts.

Law Enforcement escorts are required for all vehicles and loads:

- (1) Over 16 feet wide
- (2) Over 125 feet long

Law enforcement escorts are required when specific areas may require a city or parish escort and /or permit. Contact with parish law enforcement authorities is the responsibility of the hauler for possible requirements or restrictions.

Private Escorts are required for all vehicles and loads:

- (1) Over 12 feet wide
- (2) Over 90 feet long

- (a) An oversize and/or overweight permit is required for each escort movement. The driver(s) of the escort vehicle shall make certain a permit has been issued and shall familiarize themselves with and abide by requirements of the issued permit.
- (b) The escorting vehicle shall be registered according with state law.
- (c) At no time may an escort pull a trailer, tow another vehicle, or carry a load.

(d) Each driver of an escort vehicle must have a valid driver's license issued by a state territory of the US.

- (e) The driver of an escort vehicle must be able to read and understand this directive.
- (f) The driver of an escort vehicle is responsible for the movement and shall ensure the vehicle is operated in a manner consistent with these provisions and all provisions of the permit. In the event, the driver of the escorted vehicle does not or refuses to operate in accordance with these stipulations, the drive of the escort vehicle shall termite the movement and report this action to the proper company officials or local police authority or Caddo Parish.
- (g) It shall be the responsibility of the driver of the escort vehicle to operate as a warning vehicle only. The driver shall not run traffic lights, fail to stop at stop signs, improperly pass, etc. His authorization to warn motorists of danger shall not imply the vehicle is or should be used as a police and/or emergency vehicle.
- (h) Escorts and flagman (when required) engaged in escorting loads on the roadways of Caddo shall present a neat appearance and shall be courteous in their contact with the motoring public at all times.
- (i) All costs incidental to escorts shall be borne by the escorter or permittee.

(j) The equipment required on escort vehicles shall be available for inspection at all times and be available for inspection on demand by Caddo Parish.

(k) Payment of escort service shall be determined by the escorter and permittee.

(I) Escorts must be furnished for all movements in excess of 12 feet in width or in excess of 90 feet in length and for any other movement so designated by the Caddo Parish.

(m) In the event a law enforcement escort is required, the permittee shall pay the escort fee.

- (n) The owner and /or operator of the escort vehicle agrees to hold harmless Caddo
 Parish and its agents and employees against any action for personal injury or property
 damage sustained by reason of the authority to escort an oversize load.
 - (o) The Director of Public Works will determine that proper escort procedures are

complied with and shall have full authority to enforce all provisions of the permits and escort regulations. The authority to revoke permits and terminate the movement shall rest with Caddo Parish.

D. Equipment Required for Proper Escort Vehicle

(a) The escort vehicle shall display an approved 360-degree "Emergency warning lamp". It may be a bar, strobe, revolving and stationary lamp. It shall be amber in color.

(b) There shall be 2 solid red/fluorescent orange flags, 18 inches square, mounted at a 45degree angle atop the escort vehicle. These flags are not to extend more than 6 inches on either side of the vehicle and in no event shall exceed 8 feet 0 inches in width. These flags shall be mounted in line with the warning lamp(s).

or

- (c) The escort vehicle must have the name and address or telephone number and the city and state of the company/owner of the escort vehicle on each front door of the vehicle, plainly legible and visible to the motoring public. Well-known company logos are acceptable.
- (d) The escorting vehicle shall be equipped with 2 rear view mirrors, one on each side, so as to provide vision to the rear to ensure movement is progressing safely.
- (e) Headlights and rear lights on the escort vehicle shall be lighted during movement.

(f) The escort vehicle and the towing vehicle shall be equipped with radios such that communication between vehicles is possible. The escort vehicle will be responsible for advising the towing vehicle of any conditions arising that may require cautionary action such as reducing speed, pulling off roadway, etc.

- (g) The escorting vehicle shall be equipped with and have readily accessible a 10 lb BC dry or equivalent chemical type fire extinguisher, four 15-minute burning flares and 2 red/fluorescent orange hand held flags. It must also have available 4 additional red/fluorescent flags that are 18 inches square and 2 (2) signs with the wording "OVERSIZE LOAD". These signs must be 18 inches high and 7 feet in length. The lettering must be black on a yellow background and is to be 10 inches high with a 1-½ inch brushstroke.
- (h) For all over height loads it is strongly recommended that a clearance bar/pole of some design be attached to the escort vehicle to warn of clearance problems of the load being escorted.
- E. Escorting procedures.

(a) Speed limit for the escort load is determined by the Caddo Parish, and in any event shall not exceed 50 mph.

(b) Movement shall be made on only those roadways designated on the permit. Alternate routes shall not be used unless approved by the Caddo Parish.

(c) Movement shall be made only on dates and/or hours during times shown on the permit. No movement shall be made during the hours of darkness unless prior approval is obtained from the Caddo Parish.

(d) An escorted movement approaching any bridge structure, which cannot be traversed safely because of an inability to distinguish potential hazards by sight, shall be parked (off the roadway where possible) and the escort vehicle shall proceed across said bridge (hill or incline). Adequate time shall be allotted to allow escort to stop oncoming traffic before the oversize movement traverse said bridge, hill, or incline.

(e) Escorted vehicles will not impede the normal flow of traffic whenever possible. Whenever vehicular traffic to the rear becomes congested, it is required that the escort causes the movement to be halted onto the shoulder or safe location. The movement shall remain off the main traveled portion of the roadway until traffic has cleared. Movement may continue then until congestion reoccurs.

(f) Movement shall not be made during severe/inclement weather (heavy rain, fog, etc). When the movement is in progress and severe/ inclement weather occurs, it shall be the responsibility of the escort driver to have the vehicle being escorted removed from the travel portion of the roadway to a safe location.

(g) The operator of the escort vehicle will ensure that the oversize vehicle is not allowed to park on the main-traveled portion of the highway unless absolutely necessary or in case of extreme emergency. Anytime the combination is parked on the shoulder or right of way, flares, flags, flagman, etc shall adequately protect it.

(h) The escort vehicle shall travel to the rear of the over width movement on multi-lane roadways and in front of the escorted load on two lane roadways. The escort must be behind over-length loads and vehicles.

(i) The oversize load shall travel as near to the right as is safely possible to insure traffic will be able to pass as safely as possible. The escort and escorted load shall not infringe upon the opposite bound lane whenever possible.

(j) A single escort may be used to escort 1 or 2 loads that are over length in 1 movement.

(k) An escort will be required for each over width load exceeding 12 feet in width.

(I) The escort shall remain a sufficient distance from the movement to warn oncoming/overtaking traffic of the potential danger, but not so far as to hinder control over the movement.

(m) Violators of these provisions or requirements shall be subject to all penalties provided by the law, including revocation of permit.

(n) Warning flags are required on vehicles and loads which exceed the legal width or length. Loads will be flagged in accordance with the requirements of Caddo Parish (the industry standard). All four corners of projecting load will be flagged, plus any load extending beyond the four corners of the load. Vehicles and loads exceeding 10 feet in width must display 2 signs with the wording "OVERSIZE LOAD". One sign must be to the front of the vehicle. The other must be on the rear of the load, or if that does not result in an easily read sign, then the sign must be on the rear of the vehicle. If the load exceeds legal length or rear overhang it shall display 2 signs must be on the sides of the overhanging part of the load or, if that is not possible, then the signs must be on the side of the vehicle. If the load to the rear clears the road surfaces by at least 6 feet then no signs are required. Loads and vehicles exceeding the front of the vehicle. If the load or vehicle clears the road surface by 6 feet no sign is required. All warning signs must be at least 7 feet long and 18 inches high. The background must be yellow and the lettering black. Letters must be 10 inches high with a 1-1/2 inch brushstroke.

(o) All vehicle and loads which exceed the legal limitations for width, and length shall, when moving during hours of darkness, be equipped with the required warning lights.

Section 14-121. Penalties.

- A. Whoever owns or drives any vehicle or combination of vehicles in violation of any rule, regulation, directive, or requirement of Caddo Parish adopted pursuant to Section 14-112 through 14-125 shall be assessed a civil penalty of not more than \$175.00 for each initial violation and not more than \$500.00 for subsequent violations, at the discretion of the Director of Public Works.
- B. Except as provided for in Subparagraphs (1), (2) and (4), whoever owns or operates any vehicle or combination of vehicles in violation of any rule, regulation, directive, or requirement of Caddo Parish shall be required to reduce the load to the maximum permissible gross weight and shall be assessed a penalty on such weight which exceeds the permissible gross weight as defined by Caddo Parish or maximum allowable axle weights, whichever results in the higher fine in accordance with the following schedule:

Penalty
\$10.00 minimum
\$.01 per pound in excess legal limit
\$.02 per pound in excess legal limit
\$.03 per pound in excess legal limit
\$.04 per pound in excess legal limit
\$.05 per pound in excess legal limit
\$.06 per pound in excess legal limit
\$.07 per pound in excess legal limit
\$.08 per pound in excess legal limit
\$.09 per pound in excess legal limit
\$.10 per pound in excess legal limit
\$.11 per pound in excess legal limit

(1) Any truck hauling concrete or construction aggregates shall not be assessed a penalty for weight, which exceeds the maximum allowable axle weights, if such truck does not also exceed the maximum permissible gross weight as provided by Caddo Parish.

(2) Any truck hauling hot mix asphalt which is performing work pursuant to a contract with the state or the governing authority of a parish or municipality shall not be assessed a penalty for weight which exceeds the maximum allowable axle weights, if such truck does not exceed the maximum permissible gross weight as provided by Caddo Parish.

(3) Any truck fitted with a compactor body which is engaged in the collecting and hauling of solid waste including residential solid waste, agricultural waste, commercial solid waste, and yard trash as defined by the Department of Environmental Quality, shall not be assessed a penalty for weight which exceeds the maximum allowable axle weights if such truck does not also exceed the maximum permissible gross weight as provided by Caddo Parish. Such truck shall not be assessed a penalty for exceeding its maximum permissible gross weight, as determined by law or pursuant to issuance of a special permit, if the waste is wet and the location from which the waste was collected received measurable precipitation (.25 inches or more), as recorded by the National Weather Service recognized observation stations, within twenty-four hours prior to collection provided the total excess weight is ten percent or less of the truck's maximum permissible gross weight, as determined by law or pursuant to issuance of a special permit, the assessed penalty shall be calculated only on the excess weight, which is above the ten percent allowance for water weight.

(4) Prior to assessment of a penalty for weight, which exceeds the maximum allowable weights, the owner or operator is authorized to shift the load to reduce or eliminate such excess axle weight penalties as long as no part of the shipment is removed.

(5) A penalty for both failure to possess a required special permit and for operating a vehicle in violation of Caddo Parish arising from the same activity may be issued and shall be cumulative in nature.

(6) Whoever owns or drives a vehicle or combination of vehicles without a proper escort when such escort is required by a special permit shall be assessed a penalty of \$100.00, and the vehicle or combination of vehicles shall be impounded until proper escort is secured by the permittee.

(7) Whoever owns or drives any vehicle or combination of vehicles in violation of any rule, regulation, directive, or requirement of the secretary adopted pursuant to Caddo Parish, or in violation of the terms and conditions of any special permit issued under Caddo Parish shall be assessed a penalty of not less than \$100.00 or more than \$500.00.

(8) Whoever owns or drives a vehicle or combination of vehicles in violation of an overweight special permit shall be assessed a penalty for each pound of gross weight authorized by the special permit weight in accordance with the following schedule and shall increase the permissible gross weight authorized by the special permit if he shall satisfy any special conditions imposed by the Director of Public Works (Annual permits cannot be amended) or otherwise shall reduce his load to the maximum weight allowed under his special permit.

Gross Weight	Pounds Over Permit Penalty
0 to 3,000	.02 a pound
3,001 to 5,000	.03 a pound
5,001 to 10,000	.04 a pound
10,000 and over	.05 a pound + 100.00

(9) Payments and penalties imposed by the Director of Public Works shall be remitted to Caddo Parish.

(10) Upon completion of the proper vehicle inspection report required by the Director of Public Works, a letter shall be sent to the owner/operator of the vehicle advising what if any action shall be taken in regard to that report. The letter will advise of all fines that may have resulted from the report, how they may be paid, and the proper method of appeal.

Section 14-122. Impounding of vehicles; prohibitions.

A. Upon discovery of any vehicle or combination of vehicles operated in violation of the laws, regulations, rules, or ordinances set forth by Caddo Parish regulating the movement/operation of commercial motor vehicles in the Parish of Caddo, the vehicle or combination of vehicles shall not be impounded but may be directed by the Director of Public Works to the nearest appropriate place suitable for unloading to its licensed gross weight or maximum size and weight requirements as set forth by Caddo Parish and storage of said product to preserve it for its intended use in commerce

and in either case shall be detained or unloaded at the expense and responsibility of the owner or driver.

Section 14-123. Authority of Caddo Parish.

A. Caddo Parish as an exercise of its police powers through appropriate law enforcement agencies, shall supervise and regulate all traffic, on all roadways within the Parish roadway system and shall have the authority, in its discretion, to regulate traffic on all roadways within Caddo including city streets, State, US, and Interstate highways.

B. The Commercial Vehicle Enforcement Unit is hereby created. It shall enforce applicable Ordinances adopted by Caddo Parish on all roadways maintained by Caddo Parish. It shall be vested with the authority to direct, control, and regulate all traffic in the Parish of Caddo.

C. Upon direction of the Director of Public Works, the Caddo Parish Commercial Vehicle Enforcement Unit may restrict traffic on limited access highways; temporarily reducing the permissible weight of vehicles, which may operate thereon. On specified roadways, when due to, but not limited to, deterioration, abuse, climatic conditions or the making of required repairs, it will be done in accordance with the proper posting of signs at the terminal of said roadways, giving notice of such traffic regulation.

D. The Parish Administrator may delegate in writing to any other parish employee or office of parish government any of the duties and responsibilities of the Director of Public Works as set forth in this Chapter 14.

E. Any person aggrieved by a decision of the Director of Public Works or his designee may appeal same to the Parish Administrator. Any such written approval must be received in the Parish Administrator's office within ten (10) calendar days of the decision complained of being rendered. The Parish Administrator shall render his decision within seven (7) calendar days of receipt of any appeal. His decision shall be final.

Section 14-124. Operator Requirements.

A. No person shall drive or operate any commercial motor vehicle upon any roadway within Caddo Parish unless he has been issued the proper class CDL or Chauffeur's license for the vehicle driven required by the laws of this state.

B. No company/person may allow any person to drive or operate any commercial motor vehicle owned or controlled by them upon the roadways of Caddo parish, unless or until such person has been issued the proper class CDL or Chauffeur's license to do so as required by the laws of this state.

C. No person shall operate any commercial motor vehicle unless he has been medically qualified and can produce proper and valid documentation to prove so. (Such as a medical card or long form).

Section 14-125. Vehicle Requirements.

A. No person shall drive or move, nor cause or knowingly permit any vehicle or combination of vehicles owned or controlled by him to be driven or moved on any roadway of Caddo Parish, at any time which is in an unsafe condition as to endanger any person or property, or which does not contain those parts or is not at all times equipped with such lamps, reflectors, clearance lamps, side marker lamps, head lamps, tail lamps, stop lamps, turn signals, required auxiliary lighting, fire extinguishers, and emergency devices; and a properly operating brake system free of leaks, both visible and audible and adjusted within normal limits pursuant to the accepted industry stands.

B. No person shall drive a commercial motor vehicle upon Caddo Parish roadways unless and until such vehicle or combination of vehicles has obtained a proper motor vehicle inspection certificate(s) and has proper and valid proof of inspection in his possession.

Section 14-126. Obligations of Drivers.

A. No person shall drive or move any vehicle, nor cause or knowingly permit any vehicle owned or controlled by him to be driven or moved, on any roadway in Caddo Parish, when such vehicle is of a size or weight exceeding the limitations set forth herein.

B. No person shall operate, or knowingly permit to be operated on any roadway of Caddo parish, a vehicle or combination of vehicles, which by proper authority has been excluded from said roadway. Notice of such exclusion shall be conspicuously posted at the entrance to such roadway.

C. No person shall fail to or refuse to comply with any lawful order or direction of an officer of the Caddo Parish Commercial Vehicle Enforcement Unit, or interfere with such officer in carrying out his duties.

BE IT FURTHER ORDAINED, that if any provision or item of this ordinance or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications which can be given effect without the invalid provisions, items or applications, and to this end, the provisions of this ordinance are hereby declared severable.

BE IT FURTHER ORDAINED, that this ordinance shall take effect on June 1, 2010.

BE IT FURTHER ORDAINED, that all ordinances or parts thereof in conflict herewith are hereby repealed.

Approved as to legal form:

Parish Attorney

Date

Supreme Court Showdown: Legacy Litigation Update Erin Bambrick - Liskow & Lewis, APLC

The past year was pivotal in the world of legacy litigation. The Louisiana Supreme Court considered issues at the forefront of plaintiffs' recovery for alleged property damage due to historic oil and gas operations. The below case summaries briefly discuss a decision from the Louisiana Supreme Court and pivotal opinions from Louisiana's appellate courts that have the potential to reshape legacy litigation.

Case Summaries

State v. Louisiana Land & Expl. Co., 2020-00685 (La. 6/30/21), reh'g granted, 2020-00685 (La. 10/19/21), 326 So. 3d 257.

Majority Opinion

In 2004, the Vermilion Parish School Board ("VPSB"), individually and on behalf of the State of Louisiana, brought this legacy suit against prior lease operators, Union Oil Company of California, Union Exploration Partners (collectively, "UNOCAL"), and others who historically conducted oil and gas operations on the Section 16 properties at issue.¹ VPSB asserted various causes of action, including negligence, strict liability, unjust enrichment, trespass, breach of contract, and violations of a myriad of governing environmental rules and regulations. VPSB filed a number of amended petitions, during which time Act 312 was passed.²

During pre-trial proceedings, UNOCAL made a limited admission³ under the provisions of Act 312. UNOCAL also filed an exception of prescription, alleging the school board's strict liability claim had prescribed as more than one year had passed from when VPSB retained counsel to investigate the board's interests to when it filed suit. In response, VPSB claimed prescription did not commence when it hired an attorney, and, alternatively, its claim was imprescriptible because it filed suit in the name of the State of Louisiana, which is constitutionally immune from prescription. The trial court denied UNOCAL's exception.

Supreme Court

Showdown

Subsequently, a multi-week trial was held, and the jury returned a verdict: (1) awarding the school board \$3,500,000.00 for remediation of the land in compliance with applicable state standards and regulations pursuant to Act 312; (2) awarding an additional \$1,500,000.00 in damages for VPSB's private strict liability action; and (3) denying all other causes of action. Following the jury's verdict, VPSB filed a motion for new trial, claiming the verdict was inconsistent because the jury awarded remediation and strict liability damages but did not award any damages for its contract actions. The trial court denied VPSB's motion. Both UNOCAL and VPSB appealed the judgment of the trial court to the First Circuit.

¹ Section 16 properties are sections numbered "16" in each Louisiana township set aside to support public schools.

² Act 312 (now La. R.S. 30:29) governs claims for environmental damage due to historic oil and gas operations. It was passed in 2006 to "ensure that funds awarded for remediation of contaminated property would...be spent to remediate the property and bring the land up to current environmental standards."

A party may admit liability for environmental damage pursuant to La. R.S. 30:29 and La. Code Civ. Proc. Art. 1563. 1
The Court of Appeal: (1) affirmed the trial court's ruling on prescription, finding that VPSB's strict liability action was imprescriptible; and (2) found the jury's verdict to be inconsistent in that the jury verdict found liability for remediation damages but did not find liability for contract violations. The appellate court therefore vacated the trial court's judgment and remanded the matter for a new trial. An application for writ of certiorari was granted by the Louisiana Supreme Court.

While the Louisiana Supreme Court affirmed the Third Circuit's ruling on prescription, it did so for different reasons. The Louisiana Supreme Court considered whether the facts were sufficient to trigger the one-year prescriptive period-if they were not, then a determination of whether such claims were imprescriptible would be unnecessary. In its analysis, the court rejected the bright-line rule-advocated by UNOCAL-that hiring an attorney is dispositive proof of the knowledge required to trigger the running of prescription. The Court instead iterated that the entire evidentiary record must be considered when determining whether a party has actual or constructive knowledge of its injury. Using the manifest error standard of review, the Louisiana Supreme Court found that the trial court was not clearly wrong in finding UNOCAL failed to prove prescription had run. The Court reasoned that entering into an executive session to discuss "potential litigation" was not alone sufficient to provide evidence of actual or constructive knowledge of injuries. The Court was also persuaded by the potential ramifications were it to rule otherwise: parties would be "encouraged to engage in scattergun litigation in which every possible defendant, real or imagined, would be hastily sued without deliberative consideration." Because it found the prescriptive period had not run, the Court deemed it unnecessary to consider whether VPSB's claims were imprescriptible as a matter of law, and considered the Third Circuit's analysis of these other issues 'superfluous."

Having dealt with prescription, the Louisiana Supreme Court then turned its focus to UNOCAL's assignment of error relating to the Third Circuit's finding that the verdict was inconsistent. The Louisiana Supreme Court found no inconsistency by the jury, instead finding it was a legal error made by the Supreme Court in its previous 2013 decision rendered in this case ("*LL&E I*") that caused a legal inconsistency between the jury's role here and its statutorily permitted role in Act 312 suits.⁴ Throwing the jury a bone, the Court found the jury verdict consistent "in light of the improper jury instructions given to them." The Court concluded that these jury instructions were given under the auspices of the holding in *LL&E I*, which the Court now viewed "with clarity, was made in error."

Finding that *LL&E I* generated confusion on the part of the court of appeals and VPSB, the *LL&E II* opinion found the prior decision "incorrectly held that excess remediation damages were allowed under Act 312," without an express contractual provision. The consequences of this "misguided decision" were: (1) juries deciding the amount of damages necessary to remediate land

⁴ In *LL&E I*, the Louisiana Supreme Court held that, even without an express contractual provision requiring original condition restoration, defendants who operated unreasonably accrued an implied obligation under the Mineral Code to restore property above and beyond standards required by environmental regulations. *State of La. v. Louisiana Land and Exploration Co.*, 12-0884 (La. 1/30/13); 110 So.3d 1038. According to *LL&E I*, "excess remediation damages" above and beyond remediation required by regulation could be kept by the landowners. *Id.* In the wake of *LL&E I*, juries were often asked to determine both the amount needed to fund remediation to regulatory standards and the amount needed to restore property to the higher remediation.

to regulatory standards; and (2) juries awarding landowners damages in excess of actual costs to remediate the land absent a contractual basis.

The Court then turned to the actual language of Act 312, finding it clearly and unambiguously stated the following:

- (1) Outside of an express contractual provision, Act 312 does not allow for remediation damages in excess of those required to fund the court adopted remediation plan;
- (2) The plan is left to the sole judgment of the trial court itself, not the jury; and...
- (3) Act 312 provides no intent for the jury to decide the amount of remediation damages that meet Act 312 compliance. Act 312 only allows the jury to award excess remediation damages when an express contractual provision providing for such an award exist. Outside of any express contractual provision being present, it is error to have the jury consider any damages related to Act 312 remediation of the property. The jury's sole role is to consider liability and damages for private causes of action, as well as for contractual causes of action where an express provision allows for remediation and damages in excess of governmental standards.

The Court concluded that, given the above correct interpretation of Act 312, the jury improperly considered the amount of damages necessary for compliance with Act 312. The Court thus reversed and vacated the \$3.5 million judgment for remediation damages, finding there was no statutory support for the award and specific performance of remediation (the cost of the actual cleanup) was the appropriate remedy. The Court remanded to the trial court for a new trial for the remainder of any "non-remediation, private causes of action."

Dissent (Weimer, C.J.)

Chief Justice Weimer dissented in part as to what he called the "wholesale rejection" of *LL&E I*. While he recognized that the majority's opinion in *LL&E II* was now in line with 2014 amendments to La. R.S. 30:29, which limited remediation damages to the cost of funding the regulatory clean up plan "unless additional remediation was required by an express contractual provision providing for remediation to original condition or to some other specific remediation standard," he refused to retroactively apply the *LL&E II* interpretation to the case before him, especially considering the 2014 Act's language limiting its application to cases set for trial on or before May 15, 2014. He was also reluctant to overturn *LL&E I* given that UNOCAL assigned no error regarding the \$3 million remediation award.

Furthermore, Chief Justice Weimer did not find it necessary to remand the remaining claims for a new trial–instead he would have reinstated the jury's verdict finding UNOCAL not liable for breach of contract/lease as he considered remediation damages and breach of lease to be two distinct matters, and the jury's decision on this issue was clearly supported by the record.

Dissent (Crain, J.)

The majority opinion also spawned another written dissent, in part-this one authored by Justice Crain. Justice Crain dissented from the majority opinion that VPSB's strict liability claim did not "factually prescribe." He would have found, at a minimum, constructive knowledge of this claim when VPSB hired counsel to address damaged properties, and that the Court should have then reached the issue of constitutional immunity. He agreed with the majority's analysis that error was "injected into the proceeding by the misapplication of Act 312," and would have remanded for a new trial only as to the contractual claim.

Rehearing Held January 24, 2022

On applications by both plaintiff and defendant UNOCAL, rehearing was granted by the Louisiana Supreme Court. In its application, VPSB: (1) claimed that Act 312 is unconstitutional if it caps damages for breach of lease; (2) sought clarification on application of the decision in *LL&E II* to the current version of Act 312 (which was amended in 2014); and (3) sought clarification on the claims to be retried on remand. UNOCAL's application sought review of the prescription ruling. Rehearing was held before the Louisiana Supreme Court on January 24, 2022. As of March 17, 2022, no opinion has been issued.

Sweet Lake Land & Oil Co., LLC v. Oleum Operating Co., L.C., 2021-169 (La. App. 3 Cir. 12/1/21), reh'g denied (Feb. 23, 2022)

Sweet Lake Land & Oil Company, LLC ("Sweet Lake") initially granted an oil, gas and mineral lease on the property in Calcasieu Parish to an individual who then assigned the lease to BP's predecessor. Under this lease granted in 1947, BP's predecessors operated various wells and pits for disposal of produced water. As required by new regulation in the late 1980s, BP began closing its pits. In 1989, BP assigned the lease to another operator. The lease was later transferred to various other companies, including Oleum Operating Company, L.C. ("Oleum") and AKSM, L.C. ("AKSM"). As a result of litigation between Sweet Lake and Oleum, the acreage under lease was reduced and an amendment to the lease imposed remediation obligations beyond the original lease terms on Oleum. After amendment, Oleum continued to operate under the 1947 lease until it terminated in 2008. Sweet Lake then granted a second oil, gas and mineral lease on the property in 2008 to AKSM. The lease required ASKM to abandon the area of historic BP operations and remove "any contaminated soil" from the area. Oleum was designated as operator of the property under this new lease.

In 2010, Sweet Lake filed suit against BP, Oleum, AKSM, and others, seeking remediation and damages due to historic oilfield operations on its property. During the 2015 trial, competing remediation costs were presented by BP (\$1.4 million) and Sweet Lake (\$32 million). The jury ultimately determined BP was solely responsible for environmental damage on the property and assessed the "cost to clean up" the property at \$1.5 million. The jury rejected plaintiff's breach of contract claims as to BP, Oleum and AKSM. After the verdict, the trial court referred the matter to the Louisiana Department of Natural Resources for development of a most feasible remediation plan under La. R.S. 30:29.

In a prior appeal, plaintiff appealed the partial final judgment dismissing the contract claims as to Oleum and ASKM. The Third Circuit in that earlier appeal (Sweet Lake I) determined that the record required a finding that Oleum and AKSM breached their contracts because both assumed restoration obligations and the presence of "environmental damage" was not disputed.⁵ On remand for determination of damages as to the contractual claims, the court found Oleum and AKSM liable for damages of \$12.9 million.

As for the most feasible plan adoption, the trial court denied BP's motion for adoption of the LDNR-approved plan, finding it didn't fully address remediation of the property.⁶ The trial court's judgment also sided with the plaintiff in assessing attorney fees and costs under La. R.S. 30:29(E) for all costs and fees associated with the litigation, rejecting BP's argument that plaintiff's recovery should be limited to only those costs and fees associated with the claims on which it was successful, *i.e.*, the remediation proceedings before LDNR.

Work related to the most feasible plan was delayed for various reasons, and citing these lengthy delays, the trial court issued another judgment in 2020. The 2020 judgment recognized BP's responsibility for environmental damage and cast BP. Oleum, and AKSM liable *in solido* for the \$3.2 million in attorney fees and \$2.1 million in costs. BP appealed, questioning, among other things,⁷ the referral to the LDNR for remediation under La. R.S. 30:29 and the award of fees and costs. Sweet Lake answered the appeal, seeking a new trial on the jury's rejection of its private

causes of action against BP and additional fees for work performed on appeal. In this third appeal in the case, the Third Circuit initially considered BP's assignment of error that the court was wrong to refer the matter to LDNR for development of a plan when the jury determined BP was the sole party "responsible" for contamination but also determined Sweet Lake failed to prove the private causes of action in tort and contract against it. The Third Circuit rejected this argument, finding that BP made judicial admissions as to both environmental damage and responsibility by pursuing a strategy to relieve it of the expansive and costly remediation plan urged by plaintiff. The Third Circuit also rejected BP's argument that did not per se challenge the finding of "responsibility" but merely challenged the trial court's implementation of post-trial procedures absent proven private claims. The Third Circuit found that La. R.S. 30:29(H) contained no provision making the regulatory remedy dependent on proof of a private cause of action. The court relied on LL&E II as analogous because, as in Sweet Lake, a defendant challenged a verdict as inconsistent because the jury rejected the underlying contract claim, but the court still referred the matter to the LDNR to the case at hand. The Third Circuit then, as the Louisiana Supreme Court in *LL&E II* did, left the referral to LDNR in place.⁸

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⁵Sweet Lake Land & Oil Co., LLC v. Oleum Operating Co., L.C., 16-429 (La. App. 3 Cir. 3/8/17), 2017 WL 914767.

⁶ Whether the trial court could reject the LDNR feasible plan and order the agency to resubmit its final remediation plan was the topic of another separate appeal, Sweet Lake Land & Oil Co. v. Oleum Operating Co., L.C., 17-464 (La. App. 3 Cir. 10/18/17), 229 So.3d 993 (Sweet Lake II). Sweet Lake II found that the trial court acted within its authority in rejecting the plan.

⁷ The Third Circuit also addressed BP's assignment of error contending that the 2020 judgment assessing fees should not have been designated a partial final judgment. The court's discussion of that issue is not addressed here.

⁸ The Third Circuit recognized rehearing had been granted in LL&E II, and noted that "when and until the supreme court's ruling in that case is vacated," it agreed "with the rationale of that decision and appl[ied] it herein."

The Third Circuit then turned to BP's assignment of error relating to the assessment of *all* costs and attorney and expert fees against it. The appellate court rejected this assignment of error, reasoning that "[t]o require post-trial, line-item identification of each report, cost, expert fee, and attorney fee, by *degree of contribution* to the underlying environmental damage...ignores the overall purpose of the statute to protect, conserve, and replenish the natural resources of the state," as required by the state constitution. The court therefore affirmed the trial court's determination that plaintiff could recover *all* fees and costs.

In BP's final assignment of error, BP challenged the trial court's finding of solidary liability with Oleum and AKSM for fees and costs.⁹ The Third Circuit also rejected this challenge, finding that the cost/fees award all "originated in the clam that centered" on remediation and all three companies shared liability for at least "a baseline of remediation." Despite the fact that the obligation for Oleum and AKSM may have originated from a different source, the court considered this of no moment for a determination of solidary liability.

Finally, the Third Circuit dismissed Sweet Lake's answer as premature, but assessed additional attorney fees against BP for the cost of defending the appeal in the amount of \$25,000. The Third Circuit therefore affirmed the July 28, 2020 judgment of the trial court.¹⁰

Lexington Land Dev., L.L.C. v. Chevron Pipeline Co., 2020-0622 (La. App. 1 Cir. 5/25/21), 327 So. 3d 8, *reh'g denied* (July 13, 2021), *writ denied*, 2021-01194 (La. 11/17/21), 327 So. 3d 996.

Plaintiff, Lexington Land Development, L.L.C. ("Lexington"), filed this legacy suit in 2007, asserting claims for damages sustained by historic oil and gas exploration and production activities and a 2007 pipeline rupture. Plaintiff acquired the property via sale from the original lessors/property owners in 2005. In order to obtain financing of the sale, Lexington conducted a Phase I environmental assessment on the property, and sampling of soil and groundwater on one of the three tracts making up the property. The sampling revealed constituent concentrations above regulatory screening standards, and Lexington's consultant recommended a monitor well be installed and additional evaluation of the property for conformance to regulatory environmental standards. Despite these recommendations, Lexington did not undertake any additional evaluation or install the monitor well.

In response to the suit, one of the defendants, Chevron—the successor-in-interest to the original lessee and operator of wells on plaintiff's property, filed a partial motion for summary judgment, seeking to dismiss all pre-acquisition damage claims on the basis of the subsequent purchaser doctrine. The trial court granted the motion.

Later, following assignments of rights in 2012 and 2013 from the previous landowners, Lexington amended its petition, asserting claims on its own behalf and as assignee. Subsequently, Chevron filed a peremptory exception of prescription, claiming that plaintiff's claims were facially prescribed as all of Chevron's operations ceased by 1991, and, even if not facially prescribed, the

⁹ Because the court granted BP's motion to dismiss Sweet Lake's answer to the appeal, it did not reach BP's other assignments of error.

¹⁰ Justice Pickett issued a dissenting opinion that touched only on whether the trial court was correct in designating the judgment a partial final judgment.

one-year prescriptive period barred Lexington's claims because plaintiff had actual knowledge of damage no later than 2007, when it first filed suit.

In addition to its prescription exception, Chevron also filed a motion for partial summary judgment, arguing that it was impossible for the prior property owners to assign any rights under the leases, as those leases had expired prior to the assignment and no one can assign more rights than they have. Concurrently, Lexington filed a motion for reconsideration of the past 2009 judgment that was based on the subsequent purchaser doctrine. After hearing, the district court denied Chevron's motion for partial summary judgment but maintained its exception of prescription and dismissed all of Lexington's claims against Chevron. Additionally, the trial court denied the motion for reconsideration. Plaintiff appealed the judgment to the First Circuit.

On appeal,¹¹ the First Circuit affirmed the district court's ruling on prescription. Relying on the standards enumerated in the prior Louisiana Supreme Court cases of *Marin v. Exxon Mobil Corp.*, 2009-2368, 2009-2371 (La. 10/19/10), 48 So.3d 234 and *Hogg v. Chevron USA, Inc.*, 2009-2632, 2009-2635 (La. 7/6/10), 45 So.3d 991, the *Lexington* court found constructive knowledge sufficient to trigger the running of prescription. As for claims made by Lexington in its own capacity, the court reasoned that the consultant's 2005 Phase I assessment and Phase II investigation (which revealed pits, distressed vegetation, stained soil, and compliance orders noting that certair pits had overflowed in the past and were not in regulatory compliance), as well as constituents requiring further assessment, coupled with disclaimers of warranty in the transfer document related to past hydrocarbon production and the environmental condition of the property were sufficient to start prescription.

As for claims made as assignee of the prior property owners, the First Circuit agreed with Chevron that Lexington could not have been assigned any rights because all pertinent leases had expired prior to the assignment and "it is impossible to transfer rights to an assignee under ar expired mineral lease." Thus, regardless of whether Lexington Land's assigned contract claims were prescribed, those claims were still subject to dismissal under prior case law because the surface and mineral leases under which Chevron operated expired before Lexington Land obtained its assignment from the prior owners.

Finally, addressing the subsequent purchaser doctrine judgment, the First Circuit concluded that, at the time the motion for partial summary judgment was filed, the "jurisprudence firmly established that the right to sue for damages conferred by a mineral lease is a personal right that does not pass to a subsequent purchaser of property absent an express assignment or subrogation."¹² Because Lexington had no such assignment or subrogation at the time it originally filed suit, its claims for pre-acquisition damages were barred by the subsequent purchaser doctrine. Noting it was constrained by prior opinions, the appellate court thus affirmed the judgment of the trial court.

¹¹ The *Lexington* appellate court initially considered whether it had appellate jurisdiction and concluded that it did.

¹² Recall that *Eagle Pipe* (referenced *supra*, in the *Louisiana Wetlands* discussion, was not decided until 2011.

Louisiana Wetlands, LLC v. Energen Res. Corp., 2021-0290 (La. App. 1 Cir. 10/4/21), 330 So. 3d 674, writ denied, 2021-01610 (La. 1/12/22), 330 So. 3d 614.

In an October 2021 decision, the Louisiana First Circuit Court of Appeal affirmed that the subsequent purchaser doctrine, which states the right to sue for pre-acquisition property damage is a personal right that does not transfer to a subsequent purchaser absent an express assignment or subrogation of that right from the prior owner, applies to all transfers by particular title.

In 2009, New 90, LLC was created by a number of family members who held title to a 300acre tract in St. Mary Parish. The tract had been under lease to various oil and gas operators since the 1940s, and a number of wells had been drilled on the property pursuant to those leases. All leases had terminated and all wells on the property had been plugged and abandoned by 2000. In exchange for interests in the newly created LLC, the family members transferred their undivided interests in the tract to the LLC later that year via an Act of Transfer. The Act of Transfer transferred: "the whole of all right, title, interest and ownership" of the family members, "with full subrogation to all rights of warranty and all other rights as held therein" by the family members.

In 2016, plaintiffs, New 90, LLC and James Bailey, III, individually and as representative of various successions of family members, filed a legacy lawsuit against defendant oil and gas companies, alleging environmental damage to the 300-acre tract due to historic oil and gas operations. Defendants BP, Chevron, Southern Natural Gas and Energen Resources filed motions for partial summary judgment, alleging that New 90, LLC had no right to bring a claim for alleged property damage under the subsequent purchaser doctrine, as the Act of Transfer did not contain a specific assignment of these pre-acquisition rights.

The trial court granted the motions filed by defendants and dismissed all claims of New 90, LLC.¹³ On appeal of the judgment, the First Circuit considered whether the subsequent purchaser doctrine applied to this non-arm's length transfer.

Applying the Louisiana Supreme Court's decision in *Eagle Pipe and Supply, Inc. v. Amerada Hess Corp.*, 2010-2267 (La. 10/25/11), 79 So.3d 246, the First Circuit affirmed the trial court's ruling granting the motions for partial summary judgment. Despite the fact that the transfer was not an arms-length transfer, the court reasoned that it was "immaterial how property is transferred to a particular successor. If the transferring instrument does not contain an explicit assignment of the personal right to sue for damage to the property, that right remains with the transferor." Moreover, the general language of transfer contained in the Act was not express or specific enough to transfer the personal right to sue for damages, nor could the family members have transferred any rights to expired mineral leases. The First Circuit additionally rejected plaintiff's argument that New 90, LLC was a third-party beneficiary to one of the oil and gas leases and a joint operating agreement, finding that there was no evidence of the requisite "clear intent" of third-beneficiary status in the contracts, nor was such an intent likely given the fact that the LLC was not even created until decades after the lease at issue was executed. The First Circuit therefore affirmed the trial court's judgment granting partial summary judgment in favor of defendants.

¹³ Mr. Bailey's claims remained as the ruling did not affect his claims made individually or as representative of his family members.

Supreme Court Showdown: Citizen Suit Update Jane A. Jackson Kelly Hart Pitre, New Orleans, Louisiana

I. Introduction

Over the past several years, Louisiana landowners have adopted a new approach to address alleged property contamination arising from historical oil and gas operations—filing citizen suit claims under La. Rev. Stat. § 30:16 ("R.S. 30:16"). That statute allows private citizens, in certain circumstances, to sue to prevent violations of Louisiana's conservation regulations. Before this recent wave of R.S. 30:16 citizen suits, the statute had seldom been used, and it was unclear how the legal issues it presents would be resolved.¹ As the cases have progressed, we now have some guidance from Louisiana courts confronting for the first time the legal framework applicable this decades-old statute.

II. Background

a. The Statute

The Louisiana Department of Natural Resources, Office of Conservation, which is directed and controlled by the Commissioner of Conservation ("Commissioner"), has jurisdiction over Louisiana's natural resources as well as the "disposal of any waste product into the subsurface by means of a disposal well and the regulation of all surface and storage waste facilities incidental to oil and gas exploration and production."² Under the authority granted to him by La. Rev. Stat. § 30:4, the Commissioner promulgated Louisiana Statewide Order 29-B, which governs the disposal of waste generated from the exploration and production of oil and gas.³

There are two statutory provisions providing a right of action for alleged violations of Louisiana's conservation laws. The first one, Louisiana Revised Statutes § 30:14 ("R.S. 30:14"), obligates the Commissioner to bring suit for an injunction to restrain violations of the conservation laws:

Whenever it appears that a person is violating or is threatening to violate a law of this state with respect to the conservation of oil or gas, or both, or a provision of this Chapter, or a rule, regulation, or order made thereunder, the commissioner shall bring suit to restrain that person from continuing the violation or from carrying out the threat....⁴

¹ As of early 2018, only ten court opinions cited to the 1940 statute. As of the date of this paper, 30 opinions cite the statute.

² La. Rev. Stat. § 30:1.

³ La. Admin. Code tit. 43, Part XIX, § 101 et seq. (hereinafter "Statewide Order 29-B"); see Yuma Petroleum Co. v. Thompson, 98-1399 (La. 3/2/99), 731 So. 2d 190, 194.

⁴ La. Rev. Stat. § 30:14.

The second one is the citizen suit provision in R.S. 30:16. It provides a right of action for a private party to bring a lawsuit if the Commissioner fails to sue after receiving written notification of an alleged violation. It provides:

If the commissioner fails to bring suit within ten days to restrain a violation as provided in R.S. 30:14, any person in interest adversely affected by the violation who has notified the commissioner in writing of the violation or threat thereof and has requested the commissioner to sue, may bring suit to prevent any or further violations, in the district court of any parish in which the commissioner could have brought suit. If the court holds that injunctive relief should be granted, the commissioner shall be made a party and shall be substituted for the person who brought the suit and the injunction shall be issued as if the commissioner had at all times been the complaining party.⁵

Thus, under R.S. 30:16, a party adversely affected by an alleged violation may give the Commissioner notice of the alleged violation or threatened violation and request the Commissioner to sue. And if the Commissioner refuses to file suit under R.S. 30:14 as requested within ten days, the private citizen may sue to restrain the violation. If the court finds that injunctive relief is proper, the statute requires that the Commissioner be substituted as the plaintiff and that the injunction be issued in the Commissioner's name.

b. The Cases

Landowners asserting R.S. 30:16 claims allege that contamination on their property exceeds regulatory standards, and they seek remediation of the property and recovery of private attorney and expert fees from (typically former) operators. Often, the landowners wait to file these suits until long after they have learned of the alleged contamination, and in fact, after they already litigated—and lost—their traditional legacy⁶ lawsuits asserting tort and contract claims. These particular circumstances implicate two legal issues that were addressed by the Louisiana First Circuit Court of Appeal this year, one of which will soon be ruled upon by the Louisiana Supreme Court—prescription and res judicata.

The recent First Circuit decisions stem from a 2013 traditional legacy lawsuit jointly filed by Mr. Tureau and Mr. Guilbeau in which they alleged contamination on their separately-owned properties resulting from historical oil and gas exploration and production activities. That case was later severed into separate lawsuits, and Tureau's and Guilbeau's cases were each dismissed on summary judgment.⁷

⁵ La. Rev. Stat. § 30:16.

⁶ The term "legacy litigation" refers to hundreds of lawsuits brought by landowners seeking damages from exploration and production companies. *Marin v. Exxon Mobil Corp.*, 2009-2368 (La. 10/19/10), 48 So. 3d 234, 238 n.1.

⁷ *Tureau v. 2-H Inc.*, No. 1:13-cv-2969, 2016 WL 4499413 (W.D. La. Aug. 23, 2016), appeal dismissed sub nom. *Tureau v. Hess Corp.*, No. 16-30970, 2017 WL 5952262 (5th Cir. July 19, 2017); *Tureau v. 2-H Inc.*, No. 1:13-cv-2969, 2016 WL 4500755 (W.D. La. Aug. 23, 2016), appeal dismissed sub nom. *Tureau v. Hess Corp.*, No. 16-30970, 2017 WL 5952262 (5th Cir. July 19, 2017); *Guilbeau v. 2*

After their legacy lawsuits were dismissed, Tureau and Guilbeau each filed a citizen suit under R.S. 30:16 seeking to address the same operations and alleged contamination at issue in their original lawsuit. The plaintiffs purported to sue on behalf of the State of Louisiana and generally claimed that former operators, including the same defendants named in their original lawsuits, contaminated and failed to remediate their properties in violation of Louisiana Statewide Order 29-B. They sought injunctions requiring remediation of their properties to regulatory standards, as well as expert and attorney fees and costs under La. Rev. Stat. § 30:29.

In each case, the plaintiffs were faced with exceptions of prescription and res judicata filed by the defendants. In support of the exceptions of prescription, the defendants argued that the plaintiffs' claims under R.S. 30:16, which itself does not contain a prescriptive period, are subject to the Louisiana Civil Code's one-year prescriptive period applicable to delictual actions, including actions for damage to immovable property.⁸ Because the R.S. 30:16 suits were filed well over a year after the original lawsuit was filed in 2013 and thus over a year after the plaintiffs became aware of the damage giving rise to their claims, the defendants argued that the citizen suits were time-barred. The defendants who had obtained summary judgment in the original legacy lawsuits also argued that res judicata barred the R.S. 30:16 lawsuits because the prior judgments were final, valid, and conclusive judgments disposing of claims between the same parties and involving the same underlying facts, operations, and contamination.

The trial courts in both *Tureau* and *Guilbeau* sustained the exceptions of prescription and res judicata and dismissed the plaintiffs' R.S. 30:16 claims. Both Tureau and Guilbeau appealed the various district court judgments to the Louisiana First Circuit Court of Appeal, where the R.S. 30:16 res judicata and prescription issues were heard by three different panels that included eleven of the twelve First Circuit judges. After the First Circuit ruled, the Louisiana Supreme Court granted a writ on the prescription issue in *Tureau* and heard argument in January 2022. The supreme court's opinion has not been released as of the date of this paper.

III. Recent Rulings

a. **Prescription**

The Louisiana First Circuit first decided the prescription issue in *Tureau* and reversed the trial court's ruling that a one-year prescriptive period applies to a R.S. 30:16 claim.⁹ The court identified three grounds for its holding that the one-year prescription did not apply: 1) Louisiana Supreme Court dicta referencing R.S. 30:16 makes it apparent that the supreme court does not consider R.S. 30:16 claims to be subject to one-year prescription;¹⁰ (2) actions brought under R.S. 30:16 are "administrative enforcement suits" that are not subject to the one-year prescription on delictual actions; and (3) the action is not delictual and thus not subject to the

H, *Inc.*, No. 14-2867, 2016 WL 4507634 (W.D. La. Aug. 22, 2016), appeal dismissed sub nom. Guilbeau v. Hess Corp., 854 F.3d 310 (5th Cir. 2017).

⁸ See La. Civ. Code arts. 3492, 3493.

State ex rel. Tureau v. BEPCO, L.P., 2021-0800 (La. App. 1 Cir. 5/19/21), 326 So. 3d 925, 932-33 (citing Marin v. Exxon Mobil Corp., 2009-2368 (La. 10/19/10), 48 So. 3d 234, and Eagle Pipe & Supply, Inc. v. Amerada Hess Corp., 2010-2267 (La. 10/25/11), 79 So. 3d 246).
 Id.

one-year prescription on claims for damage to property because Tureau requested an injunction, not "damages." While the First Circuit disagreed with the trial court that a one-year prescriptive period applied to Tureau's R.S. 30:16 claim, it did not decide which prescriptive period applied, if any, instead leaving open the possibility that the claim was imprescriptible as Tureau argued.¹¹

About four months after the *Tureau* prescription opinion, a different First Circuit panel released its opinion in *Guilbeau*. As to prescription, that panel recognized the earlier *Tureau* opinion addressing the identical issue and found itself constrained to follow the existing First Circuit jurisprudence.¹² One judge wrote separately, however, to note that while the court was bound to follow the decision in *Tureau*, he believed that opinion was wrongly decided.¹³ After noting courts' typical process of examining the nature of the duty breached to determine an action's prescriptive period, Judge Guidry found that Guilbeau's claim was dependent upon a determination of damage to property and is thus delictual in nature, subject to a one-year prescriptive period, and prescribed.¹⁴

The Louisiana Supreme Court agreed to review the First Circuit's decision in *Tureau*, and the case was argued in January. As he did in the courts below, Tureau argued that his R.S. 30:16 claim was imprescriptible for several reasons. For example, Tureau contended that because prescription must be established by legislation, the claim was imprescriptible due to the absence of an express prescriptive period in the statute itself.¹⁵ He further argued that the Louisiana Supreme Court had already recognized in *Marin v. Exxon Mobil Corp.*¹⁶ and *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*¹⁷ that R.S. 30:16 claims are imprescriptible and that the claim could not be delictual because the statute authorized recovery of only an injunction, not damages. Finally, Tureau argued that a R.S. 30:16 plaintiff is asserting a regulatory claim on behalf of the Commissioner because the statute authorizes only an injunction in the commissioner's name. Thus, according to Tureau, prescription does not run on the claim as a result of the constitutional mandate that prescription shall not run against the State unless otherwise established by law.¹⁸

Defendants in *Tureau* argued, on the other hand, that prescription was indeed established by legislation and that the R.S. 30:16 action was not imprescriptible because the Legislature has not declared it imprescriptible. Defendants pointed to Civil Code article 3499, which provides that a personal action is subject to a liberative prescription of ten years unless otherwise established by legislation. Because a R.S. 30:16 action is personal action seeking enforcement of an obligation—rather than a real action seeking to enforce real rights—Defendants argued that imprescriptibility must be established by legislation. And under the analysis established by the supreme court to determine which prescriptive period applies where an action does not contain

¹¹ *Id.*

¹² State ex rel. Guilbeau v. BEPCO, L.P., No. 2020-0429, 2021 WL 4260674, at *4 (La. App. 1 Cir. 9/20/21), --- So. 3d ---.

¹³ *Id.* at *6 (Guidry, J.).

¹⁴ *Id.*

¹⁵ La. Civ. Code art. 3457.

¹⁶ 2009-2368 (La. 10/19/10), 48 So. 3d 234.

¹⁷ 2010-2267 (La. 10/25/11), 79 So. 3d 246.

¹⁸ See La. Const. art.12, § 13.

an express period, which requires examining the nature of the obligation allegedly breached, the one-year prescription for delictual action applies, regardless of whether damages were an available remedy.¹⁹ Defendants further argued that Tureau was acting on his own behalf, not on behalf of the Commissioner, and that the State's immunity from prescription was not implicated. Defendants noted that R.S. 30:16 authorizes suit only by the person in interest adversely affected by a violation and that the potential substitution of the Commissioner at the end of the case did not convert the right of action into the Commissioner's.

The supreme court has not yet issued its opinion in *Tureau*, and the First Circuit has not acted on the defendants' application for a rehearing *en banc* in *Guilbeau*.

b. Res Judicata

The primary dispute before the Louisiana First Circuit with respect to res judicata was whether a landowner's R.S. 30:16 lawsuit involves the same parties appearing in the same capacity as that landowner's original legacy lawsuit. The First Circuit first ruled on res judicata in the *Guilbeau* case and reversed the trial court judgment sustaining the exception.²⁰ The court noted that R.S. 30:16 requires that the Commissioner be substituted as a party if the trial court finds that injunctive relief should be granted and found that in his R.S. 30:16 lawsuit, Guilbeau is seeking relief to which only the Commissioner is entitled and is therefore representing the rights of the Commissioner. Conversely, in his original legacy lawsuit, Guilbeau asserted property damage claims on his own behalf and sought to recover damages he claimed were owed to him. Thus, the court concluded that there was no identity of parties because Guilbeau was appearing in a different capacity in his R.S. 30:16 lawsuit than in the original legacy lawsuit where he asserted claims on his own behalf.

Less than three weeks after the *Guilbeau* decision, a different panel of Louisiana First Circuit judges issued a 3-2 decision in a separate *Tureau* appeal likewise reversing the trial court judgment sustaining the exception of res judicata based on the court's prior *Guilbeau* decision.²¹ Despite the reversal, however, three judges on the five-judge panel agreed that, at least at this stage, the plaintiff is appearing in the same capacity in his R.S. 30:16 lawsuit as he appeared in his original legacy lawsuit. The two dissenting judges found, as the U.S. Fifth Circuit did in the recent *Grace Ranch L.L.C. v. BP America Production Co.*²² decision, that a plaintiff asserting a claim under R.S. 30:16 does so in his own name and not on behalf of the Commissioner.²³ The dissenting judges noted that they would have affirmed the judgment sustaining res judicata because Tureau is seeking an injunction and remediation of his own property as well as attorney

¹⁹ *DePhillips v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 2019-01496 (La. 7/9/20), 2020 WL 3867212, at *3 --- So. 3d ---.

²⁰ *Guilbeau*, 2021 WL 4260674, at *6.

²¹ State ex rel. Tureau v. BEPCO, L.P., 2020-0595 (La. App. 1 Cir. 10/7/21), 330 So. 3d 1107, 1113.

²² 989 F.3d 301 (5th Cir. 2021). The court in *Grace Ranch* considered whether the State was a party or the real party in interest in a R.S. 30:16 claim in connection with analyzing whether diversity jurisdiction existed. The arguments on those points mirror the arguments related to identity of parties in a res judicata analysis.

²³ *Tureau*, 330 So. 3d at 1115-16.

fees and costs, all of which would benefit Tureau himself. The third judge wrote a concurring opinion agreeing with the dissent that at this stage of the proceedings, Tureau is indeed seeking relief on his own behalf.²⁴ But the concurring judge ultimately agreed to reverse the trial court's ruling for a procedural reason, finding that because R.S. 30:16 leaves open the possibility that the Commissioner may be substituted as a party after trial, the ruling on res judicata should be reserved until that time. In addition, the concurring judge suggested that defendants should have an opportunity to urge an exception raising res judicata as to the plaintiff's claim for attorney fees and costs if that request existed at the time of the original lawsuit.

In both the *Guilbeau* case and the *Tureau* case, the defendants filed requests for rehearing *en banc* with respect to the res judicata rulings. That request in *Guilbeau* remains pending. The First Circuit denied the rehearing request in *Tureau*, and the defendants' subsequent November 2021 writ application to the Louisiana Supreme Court has not been ruled on. It appears unlikely that there will be any movement on the res judicata issue before the supreme court rules on prescription in *Tureau*.

IV. Looking Forward: Ongoing Conduct

While the supreme court's resolution of one R.S. 30:16 issue seems to be on the horizon, at least one other significant issue raised by landowners' R.S. 30:16 claims for historical operations is far from resolved. That issue is whether plaintiffs may sue under R.S. 30:16 only to prevent ongoing conduct or whether they may also sue to address alleged unremedied violations stemming from past conduct.

As discussed, R.S. 30:14 requires the Commissioner to restrain a person from continuing a violation or carrying out a threatened violation when it appears that the person "is violating or is threatening to violate" the conservation laws or regulations.²⁵ And if the Commissioner has been notified of the alleged violation or threat thereof and has failed to sue to restrain it, R.S. 30:16 permits private parties to sue for injunctive relief to "prevent any or further violations."²⁶

In the recent citizen suits, landowners alleged that former operators are violating Statewide Order 29-B by failing to remediate the property to regulatory standards despite that there is no ongoing conduct by defendants. While the application of R.S. 30:16 in these circumstances has not yet been fleshed out or addressed by Louisiana courts, the parties' positions are not difficult to predict.²⁷ According to landowners, a violation remains ongoing until it is remedied²⁸ and thus, an unremedied violation may be addressed through a R.S. 30:16 suit even if the defendants' conduct has ceased. Defendants, on the other hand, would argue that

²⁴ *Id.* at 1114-15.

²⁵ La. R.S. § 30:14.

²⁶ La. R.S. § 30:16.

²⁷ The defendants in *Tureau* asserted a motion to dismiss on this basis after the case was removed to federal district court based on diversity jurisdiction. Rather than ruling on the merits of the motion, the court abstained from exercising its jurisdiction based on the *Burford* abstention doctrine and remanded the case to state court. *Tureau v. BEPCO, L.P.*, 404 F. Supp. 3d 993 (W.D. La. 2019).

²⁸ Indeed, Tureau took this position before the supreme court in connection with his argument that his R.S. 30:16 could not prescribe.

because the language of R.S. 30:14 and R.S. 30:16 addresses *preventing* violations, those provisions apply to continuing or ongoing conduct. Thus, defendants will likely argue that R.S. 30:16 suits should not be available where former operations are at issue. So even as resolution of the prescription issue nears, this and perhaps other issues may still need to be addressed by Louisiana courts as the citizen suits continue to make their way through courts.

Supreme Court Showdown Restrictions on Assignment Redux: Consent to Assign Provisions 20 Years Later

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I. Introduction

In Louisiana, there is a long standing public policy against restricting the free alienation or assignment of interests in immovable property.² This policy is embodied in many articles of the Louisiana Civil Code (the "Civil Code"), which either prohibit such restrictions altogether or limit the restriction to a specified duration.³ There is a tension between this policy and the use of limited restrictions on assignment in contracts related to the exploration and production of oil and gas.⁴ Many authors have opined that limited restrictions on assignment serve a valid commercial purpose in the various oil and gas agreements in which they are found.⁵ Significantly, the public policy against restricting the alienation of immovable property is not absolute in Louisiana; limited restrictions are sanctioned under Louisiana law, affording players in the industry the flexibility to include them in their agreements within the limits of law.⁶

Consent to assign provisions are one such restriction commonly seen in oil and gas contracts, particularly in mineral leases. When drafting agreements, consideration should be given to whether the inclusion of a consent to assign provision is advisable, and if so, what qualifications should or should not be included within its purview. This paper will address some of the basic issues encountered when consent to assign provisions are included in contracts involving mineral rights and Louisiana law governing such provisions. It will highlight statutory and codal law

Restrictions on Assignments

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² Gueno v. Medlenka, 117 So. 2d 819 (La. 1960); Wright v. DeFatta, 142 So. 2d 489 (La. Ct. App. 2d 1962), *aff'd*, 152 So. 2d 10 (La. 1963); River Rouge Minerals., Inc. v. Energy Res. of Minn., 331 So. 2d 878 (La. Ct. App. 2d 1976) *writ den'd*, 337 So. 2d 221 (La. 1976); Mardis v. Braneley, 717 So. 2d 702 (La. Ct. App. 2d 1998) *writ den'd* 729 So. 2d 563 (La. 1998).

³ See e.g. La. Civ. Code Ann. art. 1468 (West 2012); La. Civ. Code Ann. art. 1520 (West 2012); La. Civ. Code Ann. art. 2567-68 (West 2019); La. Civ. Code Ann. art. 2620-28 (West 2019); La. Civ. Code Ann. art. 3448 (West 2005).
⁴ Gary B. Conine, *Property Provisions of the Operating Agreement - Interpretation, Validity and Enforceability*, 19 TEX. TECH L. REV. 1236, 1310 (1988).

⁵ Terry I. Cross, *The Ties that Bind: Preemptive Rights and Restraints on Alienation that Commonly Burden Oil and Gas Properties*, 5 TEX. WESLEYAN L. REV. 193 (1999); B.J. Duplantis & Martin P. Averill, *Preferential Rights and Consents to Assign*, 46 MIN. LAW INST. 1 (1999); George F. Kutzschbach, *Operating Agreement Considerations in Acquisitions of Producing Properties*, 36 SW. LEGAL FOUND. OIL & GAS INST. 7-1, 7-11 (1985); Harlam Albright, *Preferential Right Provisions and Their Applicability to Oil and Gas Instruments*, 32 Sw. L.J. 803, 804 (1978); see also Conine, supra note 4.

⁶ Mardis, 717 So. 2d 702.

potentially impacting such restrictions, examine Louisiana case law bearing on such restrictions, and touch on select authorities and cases from other states.

II. Consent to Assignment Provisions—General Principles.

Consent to assign provisions are a limited restriction on the alienability of property found in many oil and gas contracts. Despite reference to "assignments" and depending on the language employed by the parties, the provision may also apply to other transfers of mineral rights. Consent to assign provisions may be found in operating agreements, right-of-way agreements, purchase and sale agreements, farmout agreements, participation agreements, and various other agreements relating to oil and gas properties, but they are most commonly found in oil and gas leases.⁷ The primary focus of this paper will therefore be on this provision's application in mineral leases.

With respect to mineral leases, consent to assign provisions are generally viewed as beneficial to lessors.⁸ There are various reasons that lessors may wish to include consent to assign provisions in their mineral leases. A lessor may have concerns about a potential lessee's reputation, skill, or financial status;⁹ about the creation of too many interests in the mineral lease which could dilute the operator's net revenue interest and deter development;¹⁰ or about "bifurcating"¹¹ the lease resulting in multiple operations at different locations on the leased premises or even the same surface location when the lease has been horizontally divided.¹² A lessor may also wish to include the provision to use as leverage to obtain additional money or concessions in exchange for the lessor's consent.¹³

Conversely, lessees will wish to avoid such a provision because it may reduce the value of the lease, impede the lessee's ability to market the lease, or impede the lessee's ability to market

⁷ See Duplantis & Averill, *supra* note 4, at 16; John S. Lowe, *Analyzing Oil & Gas Farmout Agreements*, 3 OIL & GAS, NAT. RES. & ENERGY J. 263, 371-76 (2017); John B. McFarland & Paul G. Yale, *Let's Make a Deal: Select Issues When Negotiating Modern Oil & Gas Leases*, 67 ROCKY MNT. MIN. L. INST. 21-28 (2021).

⁸ PATRICK S. OTTINGER, LOUISIANA MINERAL LEASES: A TREATISE, 922 (2016); David E. Pierce, An Analytical Approach to Drafting Assignment, 44 Sw. L.J. 943, 949-50 (1990); T. Ray Guy & Jason E. Wright, The Enforceability of Consent-to-Assign Provisions in Texas Oil & Gas Leases, 71 SMU L. Rev. 447, 479 (2018); Blake A. Watson, Do I Have to Be Reasonable?: The Right to Arbitrarily Restrict Transfer and Occupancy and Mineral Leases, 47 CAP. U. L. REV. 27, 51-54 (2019) (Watson I); Blake A. Watson, Right to Limit or Prohibit Lease Transfers, 34 A.B.A. PROB. & PROP. 46, 48 (2020) (Watson II).

⁹ OTTINGER, *supra* note 8, at 923; Guy & Wright, *supra* note 8, at 479; Pierce, *supra* note 8 at 950; Watson I, *supra* note 8, at 36; Watson II at 48; Katy Pier Moore & Corey F. Wehmeyer, *Consent to Assignment Provisions in Texas* Oil & Gas Leases: Drafting Solutions to Negotiation Impasse, 48 TEX. TECH. L. REV. 335, 336-37 (2016).

¹⁰ Pierce, *supra* note 8, at 950.

¹¹ Mineral Code article 130 provides: "A partial assignment or partial sublease does not divide a mineral lease." La. Rev. Stat. Ann. § 31:130 (West 2000). The concern here is a practical one, not necessarily tied to the legal consequences of an assignment or sublease.

¹² McFarland & Yale, *supra* note 7, at 27-28.

¹³ OTTINGER, *supra* note 8, at 923; Pierce, *supra* note 8, at 950, 953; Watson I, *supra* note 8, at 51-52; McFarland & Yale, *supra* note 7, at 39-40; Guy & Wright, *supra* note 8, at 480.

or develop prospects including the lease.¹⁴ This is a particular concern where the landowner has extensive acreage, a history of being difficult or unreasonable, or both.¹⁵ It can also become an issue when hydrocarbon discoveries or development in the area have increased the value of the leasehold from the time period when the lease was originally taken. The right of the lessee to simply release a mineral lease and avoid future obligations to the lessor is small comfort particularly when the initial acquisition cost was high and value cannot be recovered because it is restrained from subleasing, assigning or farming out the lease.¹⁶ Generally speaking, it is not hard to see how an undue restraint on alienability could hinder commercial use of any immovable property.¹⁷

Whether a consent to assignment provision in a mineral lease is valid could be seen as theoretical,¹⁸ and some states have held that consent to assign provisions are unenforceable.¹⁹ The prevailing view however seems to be that they are likely enforceable depending on the language used by the parties.²⁰ But even recent scholarship still debates the enforceability in oil and gas agreements, particularly when a consent to assign provision gives a party the unqualified right to withhold consent,²¹ and some have suggested that withholding consent must be "reasonable" even if such qualification is not included in the agreement.²²

¹⁶ *Id*.

¹⁴ Moor & Wehmeyer, *supra* note 9, at 337.

¹⁵ *Id*.

¹⁷ Gary B. Conine & Bruce M. Kramer, Property Provisions of the Joint Operating Agreement, 2008 No. 2 ROCKY MNT. MIN. L. INST. Paper No. 3 (2008).

¹⁸ See 4 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL & GAS, § 51.3, at 307-08 (1990).

¹⁹ See Shields v. Moffat, 683 P.2d 530, 534 (Okla. 1983) ("We hold that the lease clause in the case at bar purporting to restrict alienation by the lessee of the oil and gas lease without the consent of the lessors is void and of no force or effect.").

²⁰ See OTTINGER, supra note 8, at 922-27; Cross note 4 supra at 222; Luke Meier & Rory Ryan, *The Validity of Restraints on Alienation in an Oil and Gas Lease*, 64 Buff. L. Rev. 305, 307-08 (2016); Lowe, supra note 7, at 374 (a court could view a broadly drafted restriction upon assignment in a farmout agreement as an unenforceable disabling restraint against alienation); Guy & Wright, supra note 8, at 496-504; Watson I, supra note 8 at 71-75; Watson II, supra note 8, at 51; Jason E. Wright, Updated Guidance on Consent-to-Assign Provisions in Texas Oil and Gas Leases, 6 OIL & GAS, NAT. RES. & ENERGY J. 411, 417 (2021).

²¹ Meier & Ryan, *supra* note 20, at 308 (concluding that consent to assign provisions should be enforceable in mineral leases); Guy & Wright, *supra* note 8, at 496-504 (even requiring a lessor act reasonably does not guarantee enforceability of a consent to assign provision); Watson I, *supra* note 8, at 99-100 (concluding that the right to limit assignments but "silent" consent provisions should be construed as "reasonable" consent provisions); Watson II, *supra* note 8, at 51 (reviewing the various approaches and concluding that the right to limit transfers should be upheld); McFarland & Yale, *supra* note 7, at 21-30 (noting authorities that suggest that a reasonableness requirement salvaged the validity of an otherwise unenforceable consent provision).

²² Guy & Wright, *supra* note 8, at 496-504; Watson I, *supra* note 8, at 99-100; McFarland & Yale, *supra* note 7, at 21-30.

Most Louisiana cases addressing consent to assign provisions relate to commercial leases²³ with relatively few cases addressing the issue with respect to oil and gas leases.²⁴ Louisiana courts, at least in regard to the commercial leases, have held that consent to assign provisions are enforceable.²⁵ Like commercial leases, mineral leases are contracts.²⁶ But because a mineral lease is one of the basic mineral rights, it is also a real right in immovable property,²⁷ and certain rules generally applicable to commercial leases may not apply to mineral leases. Indeed, the comments to Louisiana Civil Code article 2672 note that "before resorting to this title [Title IX Lease], as opposed to other titles of the Civil Code, one should bear in mind that a mineral lease is a real right and that it differs in many respects from an ordinary lease."²⁸

Although some authors have opined that the requirement of reasonableness should be implied when the contract is silent,²⁹ with respect to commercial leases, Louisiana courts appear to be unwilling to overlay a reasonableness requirement where consent is required and the contract has not otherwise specified that it may not be unreasonably withheld.³⁰ In cases analyzing provisions without the reasonableness restriction in that context, the parties seeking assignments have resorted to the theory of abuse of rights.³¹ There appear to be no cases in which a party has successfully argued that withholding consent to the assignment is an abuse of right. However, it is a fact intensive issue, which requires a court to examine the motive of the party refusing consent.

²³ The Civil Code recognizes various types of leases. La. Civ. Code Ann. art. 2671 (West 2005). The term "commercial leases" as used in herein means leases other than mineral leases.

²⁴ Compare Illinois Ctr. Gulf R.R. Co. v. Int'l Harvester Co., 368 So. 2d 1009 (La. 1979) (lease of premises for truck sales); Caplan v. Latter and Blum, 468 So. 2d 1188 (La. 1985) (commercial real estate lease); Truschinger v. Pak, 513 So. 2d 1151 (La. 1989) (lease of restaurant space); Gamble v. New Orleans Hous. Mart, Inc., 154 So. 2d 625 (La. Ct. App. 4th 1963) (lease of building space); Triftee Oil Co. v. W.B. Partin, 209 So. 2d 557 (La. Ct. App. 2d 1968) (surface lease); Serio v. Stewart, 427 So. 2d 692 (La. Ct. App. 4th 1983) (lease of building and lot); La. Casino Cruises, Inc. v. Capital Lake Properties, Inc., 845 So. 2d 447 (La. Ct. App. 1st 2003) (surface lease); Kano Invs., L.L.C. v. Kojis Constr., L.L.C., 113 So. 3d 1113 (La. Ct. App. 3d 2013) (lease of building space); Tenet HealthSystem Surgical, L.L.C. v. Jefferson Par. Hosp. Serv. Dist. No. 1, 426 F.3d 738 (5th Cir. 2005) (lease of space in shopping center); STC Five v. Mudbugs West Bank Dev. Corp., Inc., No. 09-3163, 2010 WL 497760 (E.D. La. Feb. 5, 2010) (lease of communication towers), *with* Cydeco Corp. v. PetroQuest Energy, LLC, 497 F. 3d 485 (5th Cir. 2007) (applying contract Texas law to assignment and assuming consent to assign provision in Louisiana mineral lease was valid); Terrebonne Par. Sch. Bd. v. Castex Energy, Inc., 878 So. 2d 522 (La. Ct. App. 1st 2004) (considering the effect of the failure to obtain the lessor's consent to assign mineral lease on third party demand for indemnity); Phoenix Assocs. Land Syndicate, Inc. v. E.H. Mitchell & Co., L.L.C., 970 So. 2d 605 (La. Ct. App. 1st 2007) (applying consent to assign provision in sand and gravel lease).

²⁵ See e.g. Illinois Ctr. Gulf R.R. Co., 368 So. 2d 1009; Truschinger, 513 So. 2d 1151.

²⁶ La. Rev. Stat. Ann. § 31:114 (West 2000).

²⁷ La. Rev. Stat. Ann. §§ 31:16, 18 (West 2000).

²⁸ La. Civ. Code Ann art. 2672, cmt. revision 2004 (West 2005).

²⁹ Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 829 n.184 (2001); Guy & Wright, *supra* note 8, at 484, 496-504; Watson I, *supra* note 8, at 32, 99-100; McFarland & Yale, *supra* note 7, at 21-30.

³⁰ See e.g. Truschinger, 513 So. 2d 1151, but see Gamble, 154 So. 2d 625.

³¹ See e.g. Truschinger, 513 So. 2d at 1154 ("When a lease contains only the stipulation that the lessor's written consent is necessary to sublease, the lessor's right to refuse will be judicially protected unless the lessor has abused that right.")

When consent may not be unreasonably withheld, courts review the lessor's stated motive for denying consent to determine whether it is (1) a pretext³² or (2) in fact unreasonable.³³ Because of the nature of the inquiry, summary judgment may not be available to resolve the issue in most cases.³⁴

Some authors have suggested that the provision may afford a "right with no remedy" because, if limited to damages, the lessor may have difficulties with proof.³⁵ But Louisiana cases suggest that lease cancellation may be available to the lessor in the event of a breach by the lessee.³⁶ With respect to a breach by the lessor, damages may be available to the lessee.³⁷

III. Louisiana Law Governing and Applying Consent to Assign Provisions.

A. Louisiana Codal and Statutory Scheme Applicable to Mineral Leases.

Before examining Louisiana jurisprudence concerning consent to assign provisions, it is important to first consider the codal and statutory scheme in which these provisions operate.

Article 2 of Louisiana Mineral Code (the "Mineral Code") states that "the provisions of [Mineral Code] are supplementary to those of the [Civil Code] and are applicable specifically to the subject matter of mineral law. . . . If this Code does not expressly or impliedly provide for a particular situation, the Civil Code or other laws are applicable."³⁸ Thus, the Civil Code articles relating to leases apply to mineral leases to the extent they are not inconsistent with the Mineral Code.³⁹ And again, mineral leases are real rights, but they are also contracts.⁴⁰ Both the Civil Code and the Mineral Code provide a default rule that leases may be freely transferred without the express consent of the lessor,⁴¹ and both codes recognize a general freedom to modify the default rules by contract for matters that do not involve public policy.⁴²

³² See Caplan, 468 So. 2d 1188.

³³ See Tenet Healthsystem Surgical, L.L.C., 426 F.3d 738.

³⁴ See generally La. Onshore Props., Inc. v. Manti Res., Inc., 755 So. 2d 988 (La. Ct. App. 3rd 1999); Coastal Drilling Co., LLC v. Shinn Enters., Inc., 2008 WL 2178070, Docket No. 05-4007 (E.D. La. May 22, 2008) *STC Five*, No. 09-3163, 2010 WL 497760.

³⁵ Cross, *supra* note 5, at 222; Moore & Wehmeyer, *supra* note 9, at 338; Guy & Wright, *supra* note 8, at 490.

³⁶ Moore & Wehmeyer, *supra* note 9, at 338; Guy & Wright, *supra* note 8, at 490.

³⁷ Moore & Wehmeyer, *supra* note 9, at 338.

³⁸ La. Rev. Stat. Ann. § 31:2 (West 2000).

³⁹ *Id*; *see also* La. Civ. Code ann. art. 2672 (West 2005) ("A mineral lease is governed by the Mineral Code."); Succession of Doll, 593 So. 2d 1239, 146-147 (La. 1992).

⁴⁰ La. Rev. Stat. Ann. §§ 31:16, 18, 114 (West 2000).

⁴¹ See La. Civ. Code Ann. art. 2713 (West 2005), and La. Rev. Stat. Ann. § 31:127 (West 2000).

⁴² See La. Civ. Code Ann. art. 1971 (West 2008), and La. Rev. Stat. Ann. § 31:3 (West 2000).

1. The Civil Code.

The Civil Code articles on leases include certain rules not found in the Mineral Code, and it is unclear the extent to which these Civil Code articles overlay the default rules in the Mineral Code. As noted, the comments in the Civil Code caution that the articles on leases may not apply to mineral leases and that application of other provisions in the Civil Code may be more appropriate given the nature of a mineral lease.⁴³ There are however no cases in which a lessee has challenged the application of the rules in the Civil Code to a mineral lessor's right to restrict the lessee's ability to freely transfer a mineral lease. Indeed, there are few cases that address any issue related to consent to assign provisions in mineral leases and none that analyze whether the rules in Civil Code should be applied.⁴⁴ But Louisiana oil and gas scholars and authors have opined that the rules in the Civil Code remain applicable to mineral leases after the adoption of the Mineral Code.⁴⁵

Before a significant overhaul of the Civil Code articles relating to leases in 2004,⁴⁶ article 2725 of the Louisiana Civil Code of 1870 addressed the right of a lessor to restrict the lessee's right to sublease or assign a lease. This article provided:

The lessee has the right to underlease, or even to cede his lease to another person, unless this power has been expressly interdicted.

The interdiction may be for the whole, or for a part; and this clause is always construed strictly.⁴⁷

Most Louisiana cases addressing consent to assign provisions apply article 2725 of the Louisiana Civil Code of 1870, rather than the current law. With respect to the rule of strict construction in former article 2725, there are conflicting opinions about whether consent to assign provisions are construed strictly for or against the lessee.⁴⁸ That issue is now settled by the adoption of Civil Code article 2713, effective January 1, 2005.⁴⁹

Restrictions on Assignments

⁴³ La. Civ. Code Ann art. 2672, cmt. revision 2004 (West 2005). See La. Rev. Stat. Ann. 31 §§ 16, 18 (West 2000) (mineral rights are real rights; mineral leases are a one of the basic real rights); *cf.* Meier & Ryan, *supra* note 20, at 306 (generally discussing the *sui generis* nature of mineral leases and general principles regarding restraints on alienation as applied to mineral leases); *cf.* Guy & Wright, *supra* note 8, at 483 (noting that mineral leases are "fee simple" estates and that restraints on alienation are greatly disfavored); *cf.* Watson I, *supra* note 8, at 55-56.

⁴⁴ *Phoenix Assocs. Land Syndicate, Inc.*, 970 S0. 2d 605; *Terrebonne Par. Sch. Bd.*, 878 So. 2d 522; *Cydeco Corp.*, 497 F. 3d 485.

⁴⁵ OTTINGER, supra note 8, at 919; John M. McCollam, A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code, 50 TUL. L. REV. 732, 783 (1976); Duplantis & Averill, supra note 4, at 16.

⁴⁶ William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-year Milestone: Origin, History and Accomplishments*, 56 LA. BAR J. 85, 91 (2008) (recognizing revisions to Louisiana Civil Code, Book III, Title IX, Lease, Chapters 1-4, revised by Acts 2004, No. 821).

⁴⁷ La. Civ. Code art. 2725 (repealed 2005).

⁴⁸ Compare Caplan, 468 So. 2d 1188, with Truschinger, 513 So. 2d 1151.

⁴⁹ La. Civ. Code Ann. art. 2713 (West 2005).

Louisiana Civil Code article 2713 reads:

The lessee has the right to sublease the leased thing or to assign or encumber his rights in the lease, unless expressly prohibited by the contract of lease. A provision that prohibits one of these rights is deemed to prohibit the others, unless a contrary intent is expressed. In all other respects, a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed against the lessor.⁵⁰

Civil Code article 2713 includes essentially three rules: (1) that a restriction of the right to sublease, assign, or encumber a lease must be expressly stated in the contract, (2) that a restriction of one such right pertains to all three, unless a contrary intention is expressed, and (3) that, in all other respects, provisions prohibiting the right to sublease, assign, or encumber a lease are strictly construed against the lessor. According to the comments, the first rule is not new; the second rule is new, and the third clarifies prior case law.⁵¹

The new rule in article 2713 (that a provision prohibiting the right to either sublease, assign, or encumber a lease is construed to be a restriction of all three) has the potential to greatly expand the scope of a consent to assign provision—particularly through the extension of such provisions to include encumbrances in the absence of express language. How this provision will be applied by courts is unclear. For instance, will a consent provision that requires consent to exercise two of the three rights within its purview (assignments and subleases for instance) be deemed to include the third (encumbrances)? What constitutes an encumbrance? Could the provision apply to assignments of overriding royalties,⁵² which are carved out of the lessee's interest but are not assignments of the lease itself?⁵³ What about other interests in production, such as net profit interests or production payments? Does it apply to other transfers such as exchanges or donations?

In any event, to the extent this new provision in article 2713 is a substantive change in the law, it should not be retroactively applied to impair the rights included in leases granted before its effective date.⁵⁴

2. The Mineral Code.

With regard to the right to grant subleases and assignments of a mineral lease, article 127 of the Mineral Code simply provides: "The lessee's interest in a mineral lease may be assigned or

⁵⁰ La. Civ. Code Ann. art. 2713 (West 2005).

⁵¹ La. Civ. Code Ann. art. 2713, cmt. revision 2004 (West 2005).

⁵² See Johnco, Inc. v. Jameson Interests, 741 So. 2d 867, 872 (La. Ct. App. 3d Cir. 1999) ("secret" overriding royalty was not an encumbrance).

⁵³ Sara E. Mouledoux, A Primer on Overriding Royalties, 57th Ann. Inst. on Min. L., 158 (2010) (citing Eugene Kuntz, Law of Oil & Gas, § 63.2, 217 (2009)).

⁵⁴ Born v. City of Slidell, 180 So. 3d 1227, 1235-36 (La. 2015); Block v. Reliance Ins. Co., 433 So. 2d 1040, 1044 (La. 1983).

subleased in whole or in part."⁵⁵ The suite of articles within which article 127 falls is designed to address the relationship between the original lessor and the assignee or sublessee and define the rights, obligations, and other legal consequences of the transaction.⁵⁶ Many of these articles are a departure from rules developed through the pre-Code case law and were designed to ensure "certain common results flowing from the execution of either an assignment or sublease."⁵⁷ The Mineral Code articles addressing subleases and assignments are silent with respect to whether the rights to assign and sublease may be restricted. However, these provisions are commonly included in mineral leases and generally understood to be enforceable.⁵⁸

It should be noted that, even if consent to an assignment is required and given by the lessor, the original lessee is still bound by the lease unless the lessor expressly releases the original lessee from liability in writing.⁵⁹ Because assignor or sublessor remains liable for the lease obligations, concerns about the proposed transferee's ability to perform lease obligations are minimized. In this regard, the Mineral Code has addressed one of the underlying concerns giving rise to the common use of consent to assign provisions.⁶⁰ Further, in the event of an assignment or sublease, the transferee becomes directly responsible to the lessor.⁶¹ So an assignment or sublease arguably puts the lessor in the more favorable position of having multiple parties from whom to demand performance. That said, the lessor must accept performance by the assignee or sublessee and may not demand performance by the original lessee unless the sublessee or assignee has not performed.⁶²

Assignments of leases and subleases are subject to the laws of registry, and accordingly, the Mineral Code provides that an assignee or sublessee is bound by notice sent to the original lessee, unless the lessor has been given prior written notice of the assignment and the assignment has been filed for registry.⁶³

⁶⁰ Many authors have noted that primary concerns motivating the inclusion of a consent to assign provision are concerns about the transferee's financial responsibility and ability to meet the lease obligations. McFarland & Yale, *supra* note 7, at 27-28; Watson I, *supra* note 8, at 36-37, 51-54; Pierce, *supra* note 8, at 949-51; Guy & Wright, *supra* note 8, at 479; Watson II, *supra* note 8, at 48. Two authors have observed that, at least in Texas, printed lease forms usually provide that an assignment of the mineral lease "shall, to the extent of the interest of such assignment, relive and discharge Lessee of any obligations hereunder." McFarland & Yale, *supra* note 7, at 21-27. This is not the case in Louisiana. A proposed solution to meet the lessor's concerns is to include a lease provision that the original lessee will remain bound by the contract after the assignment, which is actually the default rule in Louisiana. *Compare* McFarland & Yale, *supra* note 7, at 21-28; Pierce, *supra* note 8, at 950-51, *with* La. Rev. Stat. Ann. § 31:129 (West 2000).

⁵⁵ La. Rev. Stat. Ann. § 31:127 (West 2000).

⁵⁶ See La. Rev. Stat. Ann. §§ 31:126, et. seq. (West 2000).

⁵⁷ McCollam, *supra* note 45, at 829.

⁵⁸ OTTINGER, *supra* note 8, at 922; Cross, *supra* note 5, at 167.

⁵⁹ La. Rev. Stat. Ann. § 31:129 (West 2000).

⁶¹ La. Rev. Stat. Ann. § 31:128 (West 2000).

⁶² La. Rev. Stat. Ann. § 31:121 (West 2000).

⁶³ La. Rev. Stat. Ann. § 31:132 (West 2000).

B. Louisiana Cases Addressing the Result of Lack of Consent.

1. Under What Circumstances May Consent be Withheld?

As noted above, it is widely recognized that consent to assign provisions are enforceable; however, this does not answer the question of whether there are any limitations to denying consent once it is sought. There are a number of cases in which lessees have asserted certain legal theories to challenge the lessor's reasons for withholding consent. The theories of "abuse of rights" and challenges of the "reasonableness" of refusal to consent have been made by lessees and proposed sublessees and assignees. Some challenges have been met with limited success, and some courts have allowed a lessor to refuse consent, even when it is used as a tactic to extract more money out of a lessee.

However, the Louisiana cases in which the lessee's arguments have failed in this regard do not involve mineral leases and many rely on the erroneous view that a provision restricting the transfer of a lease should be construed *against the lessee*.⁶⁴ That issue has been resolved by Civil Code article 2713 which states that "a provision that prohibits subleasing, assigning, or encumbering is to be strictly construed *against the lessor*."⁶⁵ So a different result may prevail if these issues are reexamined. Consistent with the tenet that a restriction against assignment should be strictly construed, several scholars reviewing cases in other states have recognized the modern view that consent to assign provisions should be read to imply a "reasonableness" standard even in the absence of such language.⁶⁶ The cited bases to imply that consent may not be "unreasonably withheld" are (1) the general principle that a contract should be performed in good faith, (2) the expectations of the parties, and (3) the general policy that restraints against alienation are disfavored.⁶⁷

Moreover, even before the Civil Code clarified that restrictions should be strictly construed against the lessor, courts did not allow a lessor to refuse consent when they found that the reason for the refusal was actually a pretext or guise.

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⁶⁴ See Illinois Ctr. Gulf R.R. Co., 368 So. 2d at 1013; Truschinger, 513 So. 2d at 1154.

⁶⁵ La. Civ. Code Ann. art. 2713 (West 2005). According to the comments, this provision is not new, and because this provision may be viewed as interpretive, it should be retroactively applied. La. Civ. Code Ann. art. 6 (2013); *see* Jacobs v. City of Bunkie, 737 So. 2d 14, 19 (La. 1999), *citing* Sudwischer v. Estate of Hoffpauir, 705 So. 2d 724, 728 (La. 1997) ("Interpretative laws are those which clarify the meaning of a statute and are deemed to relate back to the time that the law was originally enacted. Procedural laws prescribe a method for enforcing a substantive right and relate to the form of the proceeding or the operation of the laws.").

⁶⁶ Merrill & Smith, *supra* note 29, at 829 n.184; Guy & Wright, *supra* note 8, at 484-485; Watson I, *supra* note 8, at 32-33, 83-86.

⁶⁷ Merrill & Smith, *supra* note 29, at 829 n.184; Guy & Wright, *supra* note 8, at 484-485; Watson I, *supra* note 8, 47, 75-79.

a. "Silent" Consent Provisions Requiring Consent Without Qualification.

As alluded to above, Louisiana courts have historically found that, unless it constitutes an abuse of rights, a lessor may withhold consent for any reason unless the contract expressly states that consent may not be unreasonably withheld. These cases arise in the commercial lease context.

Illinois Central Gulf Railroad Co. v. International Harvester Co., is the leading case in Louisiana addressing under what circumstances a lessor may withhold consent if the contract is otherwise silent.⁶⁸ The case involves the lease of a building which was to be used as a truck sales and service center.⁶⁹ After the lease was confected, the Superdome was constructed directly across the street and the value of the property dramatically increased.⁷⁰ The lessee approached the lessor about subleasing the property for the purpose of developing a parking facility.⁷¹ The lesser refused to grant consent to the sublease, and after protracted negotiations between the lessee and lessor, the lessee subleased without consent.⁷²

The trial court awarded lease cancellation to the lessor as a remedy for the breach of the consent to assign provision.⁷³ The lessee argued on appeal to the Louisiana Supreme Court that the lessor impliedly consented to the sublease by accepting rental payments for eighteen months after the sublease. However, the court found that unequivocal evidence was required to prove acquiescence to the sublease.⁷⁴ The court recognized that the lessee's proposal would expand the use of the leased premises beyond what was contemplated in the agreement.⁷⁵ Because the lessor had initially opposed the sublease and was unaware that the lease payments were being made by the sublessee until shortly before suit was filed, the court found that there was no implied consent.⁷⁶

The lessee also argued that the lessor's withholding of consent to the assignment constituted an "abuse of right."⁷⁷ The court recognized that Louisiana cases had strictly construed prohibitions on assignment against the lessee.⁷⁸ The court found that the abuse of rights doctrine could only be applied when:

(1) the primary object of exercising the right is to cause harm,

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⁶⁸ Illinois Ctr. Gulf R.R. Co., 368 So. 2d 1009.
⁶⁹ Id. at 1010.
⁷⁰ Id.
⁷¹ Id.
⁷² Id. at 1010-11.
⁷³ Id.
⁷⁴ Id. at 1012.
⁷⁵ Id. at 1013.
⁷⁶ Id.
⁷⁷ Id.

⁷⁸ Id.

- (2) there is no serious and legitimate reason for exercising the right,
- (3) exercising the right is against moral rules, good faith, or elementary fairness, or
- (4) the right is exercised for a purpose other than that for which it was granted.⁷⁹

Here, the court found that the primary motivation for withholding consent was to negotiate cancellation of the lease since the property's value had significantly increased since the original lease was taken.⁸⁰ After a detailed analysis of Illinois Central's conduct the court determined that the lessor's refusal to give consent did not fall within any of the definitions of an abusive use of rights, thus the doctrine provided no defense to the claim of breach of contract for failing to obtain the required consent.⁸¹

Similarly, in *Truschinger v. Pak*, the lessee was to receive \$80,000.00 from the sublessee for the sublease of a commercial lease, and the lessor demanded half of this sum for his consent to the sublease.⁸² The lessee refused and sued for damages for the lessor's "unreasonable" failure to consent to the sublease. The court reasoned that the consent to assign provision should be strictly construed against the lessee and contained no express provision that consent would not be "unreasonably" withheld. Accordingly, the Court found that the lessee's only recourse was through the abuse of rights doctrine.⁸³ The Court concluded that the refusal was not an abuse of rights because the lessor's primary motive was economic, not a desire to harm the lessee.⁸⁴

The Fourth Circuit reached a different result in *Gamble v. New Orleans Housing Mart, Inc.*⁸⁵ In *Gamble*, the court held that a lessor "cannot unreasonably, arbitrarily or capriciously withhold his consent," even though the lease involved in the case contained no express language that consent could not be unreasonably withheld.⁸⁶ This holding in *Gamble* was later cited with approval by the Louisiana Supreme Court in *Caplan v. Latter & Blum, Inc.*⁸⁷

b. Provisions Stating That Consent May Not be "Unreasonably" Withheld.

When a consent to assign provision expressly states that consent shall not be unreasonably withheld, courts undertake an examination of the lessor's motives behind withholding consent. Lessors should be mindful that unreasonably withholding consent could result in a successful claim

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⁷⁹ *Id.* at 1014.

⁸¹ *Id.* at 1015.

⁸³ *Id.* at 1154.

⁸⁶ *Id.* at 627.

⁸² Truschinger, 513 So. 2d 1151.

⁸⁷ Caplan, 468 So. 2d 1188, 1191 (La. 1985).

⁸⁵ *Gamble*, 154 So. 2d 625.

⁸⁰ Id.

⁸⁴ Id.

for damages by the lessee in the event that an economic loss results from the refusal to give consent.

In *Caplan*,⁸⁸ the Louisiana Supreme Court examined the application of a provision in a commercial lease that provided that consent would not be "unreasonably" withheld. The lessor asserted that consent was withheld because (1) the proposed sublessee did not meet its financial criteria, (2) certain improvements proposed by the sublessee were cost prohibitive, and (3) the sublease did not meet the terms of the original lease because it would increase the rentals on the property. After the sublessee dropped the issue of making improvements, the lessor again refused to consent. In this case, the court found that the reasons given by the lessor for withholding consent were pretextual thus not a valid cause for withholding consent.

The court found that the sublessee's financial status was immaterial because the lessee would remain obligated under the lease, and the variance in terms (the higher rentals) was anticipated by the lessor and, in fact, had been indorsed on one other occasion.⁸⁹ The court noted that the pretexts advanced as reasons for withholding consent were not sufficient grounds for a "reasonably prudent business person to deny consent."⁹⁰ Under these circumstances, withholding consent was a violation of the express terms of the contract.⁹¹

Similarly, in *Associates Commercial Corp. v. Bayou Management, Inc.*,⁹² the Louisiana First Circuit Court of Appeal found that the lessor violated the terms of a commercial lease by failing to consent to an assignment. In this case, the court noted with approval the trial court's finding that the lessee provided the "best proof possible" that the sublessee met all the requirements of the lessor because the lessor subsequently leased another property to the proposed sublessee.⁹³

Conversely, in a more recent case, *Louisiana Casino Cruises, Inc. v. Capitol Lake Properties, Inc.*, the same court found that a lessor's reasons for withholding consent to a leasehold mortgage were reasonable.⁹⁴ In *Louisiana Casino Cruises*, the lessee, Louisiana Casino, requested that its lessor, Capital Lake, allow Louisiana Casino to mortgage its leasehold interest, as guarantor of a \$350,000,000 loan to its parent company.⁹⁵ Louisiana Casino sought Capital Lake's consent by asking it to execute a waiver and estoppel form.⁹⁶ Capital Lake repeatedly refused consent on the grounds that (1) Louisiana Casino had defaulted under the lease and at least one default was incurable and (2) the estoppel agreement contained requests for actions not required by the lease.⁹⁷

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⁸⁸ Caplan, 468 So. 2d 1188.

⁸⁹ Id. at 1191.

⁹⁰ Id.

⁹¹ Id.

⁹² Assocs. Commercial Corp. v. Bayou Mgmt., Inc., 426 So. 2d 672 (La. Ct. App. 1st 1982).

⁹³ *Id.* at 674.

⁹⁴ La. Casino Cruises, Inc., 845 So. 2d 447.

⁹⁵ *Id.* at 448.

⁹⁶ Id.

⁹⁷ *Id.* at 448-89.

On appeal, Louisiana Casino argued, *inter alia*, that the reasons espoused by Capital Lake for withholding consent (prior breaches of the lease and requests for subordination) had been cured or withdrawn.⁹⁸ The court found, however, that there were other sound economic reasons for withholding consent. Specifically, the arrangement resulted in a significant increase in Louisiana Casino's debt and its parent company's debt-equity ratio was twice the industry standard.⁹⁹ Under these circumstances, Capital Lake had sufficient "reasonable" grounds for withholding its consent.¹⁰⁰

Even if the reason given is not pretextual, a question still remains: whether the reason for withholding consent is, in fact, reasonable. In *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hospital Service District No. 1*,¹⁰¹ the Fifth Circuit examined the "reasonableness standard" and concluded that an objective standard applies to determine whether consent has been reasonably withheld.

Tenet HealthSystem Surgical involved a lease of building space "for out patient [sic] surgical procedures and general medical and physicians [sic] offices, including related uses and for other purposes reasonably acceptable to Landlord" which included a consent to assign provision that stated that consent "shall not be unreasonably withheld."¹⁰² The lease was granted to plaintiff, Tenet HealthSystem Surgical, L.L.C. ("Tenet"), by Marrero Shopping Center, Inc. ("MSC").¹⁰³ Tenet initially used the lease premises as an outpatient surgical center.¹⁰⁴

The property was located adjacent to West Jefferson hospital, and West Jefferson Medical Center ("West Jeff") later purchased the property from MSC subject to Tenet's lease.¹⁰⁵ Tenet ceased operating as a surgical center shortly after West Jeff purchased the property and then sought to assign the lease to Pelican Medical—West, L.L.C. ("Pelican") for use as an occupational medicine clinic.¹⁰⁶ Tenet requested West Jeff's consent to allow an assignment to Pelican.¹⁰⁷ West Jeff refused to give Tenet its consent, and after a request from Tenet, West Jeff explained that one of its reasons for denying its consent was that Pelican proposed using the leased premises in a manner that would compete with West Jeff's own operations.¹⁰⁸ Tenet filed suit against West Jeff claiming, *inter alia*, that West Jeff breached the lease by unreasonably withholding its consent.¹⁰⁹

⁹⁸ Id. at 449-50.
⁹⁹ Id. at 450.
¹⁰⁰ Id.
¹⁰¹ 426 F.3d 738.
¹⁰² Id. at 740.
¹⁰³ Id.
¹⁰⁴ Id.
¹⁰⁵ Id.
¹⁰⁶ Id.
¹⁰⁷ Id.
¹⁰⁸ Id.
¹⁰⁹ Id.

West Jeff argued that its refusal to grant consent to the assignment was reasonable for two reasons: (1) that the contemplated use exceeded those permitted under the lease, and (2) that Pelican's operations would compete with West Jeff's operations at the adjacent hospital.¹¹⁰ With respect to the first of these arguments, the court examined the contract language and the services that were to be offer by Pelican, and concluded that they fell within the permitted use of the premises.

The more difficult question was whether West Jeff could withhold its consent because the proposed sublessee would complete with West Jeff's own business. Tenet argued that reasonableness must be viewed from the perspective of the parties' expectations at the inception of the contract at which time the lessor was not a competitor.¹¹¹ Prior cases had noted that "withholding consent is unreasonable where there is no 'sufficient grounds for a reasonably prudent business person to deny consent."¹¹² But Louisiana courts had yet to deal with a situation in which the identity of the lessor changed and the new lessor refused consent for personal reasons.¹¹³

The Fifth Circuit concluded that an objective standard applies.¹¹⁴ The court reasoned that the lessor's "personal tastes or convenience" are not factors that should be considered.¹¹⁵ Rather, in determining whether a "reasonably prudent business person" would grant consent, the only factors that should be considered are those that "relate to the landlord's interest in preserving the leased property or in having the terms of prime lease performed."¹¹⁶ The factors considered essentially boil down to the (1) financial responsibility of the proposed subtenant and (2) the proposed use and nature of the occupancy.

In this regard, Louisiana mineral lessees may be in a better position than those holding general commercial leases in arguing that consent should not be withheld. As noted, the original lessee remains responsible to the lessor which mitigates concerns about the financial responsibility of the proposed sublessee or assignee, and by the very nature of a mineral lease, use and occupancy by sublessee or assignee will be the same as the original lessee's. If an objective test is applied, refusing consent to assign a mineral lease may be limited to situations in which the proposed transferee has an objectively bad track record, including incidents of prior lease violations, regulatory violations, or improper payments of royalties.

¹¹⁰ Id. at 742.
¹¹¹ Id.
¹¹² Id. at 743.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Id.
¹¹⁶ Id.

2. Lessor's Acquiescence to a Sublease or Assignment.

Several courts have found that a party's acquiescence to an assignment relieved the other party from the requirement of obtaining express consent. Acquiescence can be shown by proving that the lessor accepted the benefit of payment by a sublessee or assignee for an extended period of time without complaint. However, acceptance of payment must be made with knowledge that it is being made by the assignee or sublessee.

In *Moore v. Bannister*, the Fourth Circuit Court of Appeal found that permitting a sublessee to stay on the premises for in excess of six months and accepting rental payments during that period was a tacit acceptance of the sublease.¹¹⁷ In *Moore*, the lessor sought information regarding the sublessee's financial status and considerable correspondence took place between the lessor and original lessee; however, after two months of correspondence, the sublessee moved onto the premises without a final determination of the issues. The lessor was made aware of this about a month later, but made no objection for over six months.¹¹⁸

The Louisiana Supreme Court later harmonized this result in *Illinois Central Gulf Railroad Company*, endorsing the approach taken by the court in *Moore* but reaching a different result, noting that acquiescence is a question of intent involving an individual factual determination.¹¹⁹ In *Illinois Central*, the court relied on the trial court's express finding of fact that there was no evidence of acquiescence.¹²⁰

This issue was again raised in *Louisiana Onshore Properties, Inc. v. Manti Resources, Inc.*,¹²¹ in which the court examined a consent to assign provision contained in an oil and gas participation agreement that required all participants consent to any assignment of the agreement. Shell Onshore Ventures, Inc. and Shell Western E & P, Inc. ("Shell") assigned their interests in the participation agreement to Louisiana Onshore Properties, Inc. ("Louisiana Onshore") without obtaining written consent from one of the participants, Energy Investments Company ("Energy Investments"). Thereafter, Louisiana Onshore demanded that one of the original participants, Manti Resources, Inc. ("Manti"), turn over operations to Louisiana Onshore. When Manti refused, Louisiana Onshore filed suit seeking a declaratory judgment that it was the operator under the terms of the participation agreement. The trial court granted summary judgment to Manti.

The Louisiana Third Circuit Court of Appeal found that, even though written consent was not obtained from one of the parties to the agreement, Energy Investments, it may have consented by its actions.¹²² Specifically, after the assignment, Energy Investments sought the approval and consent from Louisiana Onshore when it assigned its own interest in the agreement to Enron

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¹¹⁷ Moore v. Bannister, 269 So. 2d 291 (La. Ct. App. 4th 1972).

¹¹⁸ See Major v. Hall, 251 So. 2d 444 (La. Ct. App. 1st 1971), rev'd on other grounds, 263 So. 2d 22 (La. 1972).

¹¹⁹ Illinois Ctr. Gulf R.R. Co., 368 So. 2d at 1013.

¹²⁰ *Id.* at 1012.

¹²¹ 755 So. 2d 988 (La. Ct. App. 3rd 1999).

¹²² *Id.* at 994.

Capital and Trade Resources ("Enron").¹²³ Further, Energy Investments sent a letter to Louisiana Onshore requesting that all further correspondence regarding elections under the participation agreement be sent to Enron.¹²⁴ Accordingly, the court reversed.

Note that, because the decision is a reversal of summary judgment, it does not hold that the facts were sufficient to show acquiescence to the assignment, but only that there remained a genuine issue of material fact as to consent.

Reliance on lessor acquiescence is not advisable because of difficulties of proof. A lessee will have to show that acquiescence occurred with knowledge that the interest had been transferred and the lessor did not objection for an extended period of time. With respect to mineral leases, this could be difficult, if not impossible to prove, if the transferee is a non-operator who does not pay royalties to the lessor and subsequent notice of the transfer is not given to the lessor.

3. Assignee's Rights Against the Lessor or the Lessee When Consent is Refused.

In Litiwanti Enterprises v. Walden Books, Co., the Louisiana Fourth Circuit Court of Appeal examined whether a prospective sublessee has a claim against the lessor for refusing to consent to a proposed sublease and concluded that no such right existed. The prospective sublessee argued that the lessor had "intentionally interfered" with its proposed contact with the original lessee by refusing to consent to the assignment.¹²⁵ The court found that the original lessor owed no duty to the proposed sublessee, a required element of a claim of intentional interference.¹²⁶ Further, the court noted that, while the Louisiana Supreme Court has recognized a cause of action for "intentional interference with contract" under its holding in 9 to 5 Fashions v. Spurrey, ¹²⁷ no court has ever recognized a cause of action for "intentional interference with a proposed contract."¹²⁸

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After addressing the sublessee's primary argument, the court examined whether the abuse of rights doctrine applied.¹²⁹ The court found that the sublease would not be economically beneficial to the lessor because the market value of the lease had increased since the execution of the original lease, thus the lessor could obtain a higher rental by withholding consent and granting a new lease.¹³⁰ The court further noted that the sublease would also violate the terms of the original

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¹²³ Id.

¹²⁴ Id.

¹²⁵ Litiwanti Enters. v. Walden Books, Co., 670 So. 2d 558 (La. Ct. App. 4th 1996).

¹²⁶ *Id.* at 560.

¹²⁷ 9 to 5 Fashions v. Spurrey, 538 So. 2d 228 (La. 1989).

¹²⁸ Litiwanti Enters., 670 So. 2d at 560.

¹²⁹ *Id.* at 561.

¹³⁰ *Id*.

lease which required a bookstore to be operated in the leased premises.¹³¹ Under these circumstances, the court held that withholding consent was not an abuse of right.¹³²

With respect to whether a prospective transferee has rights against its transferor in the event that a lessor withholds or conditions consent, the United States Fifth Circuit Court of Appeals opinion in *Cedyco Corp. v. PetroQuest Energy, LLC*,¹³³ provides some guidance.

The case involved a contract to sell certain working interests, including wells and a sublease of a mineral lease in Louisiana (the "Louisiana Assets"), made pursuant to an auction conducted by the Oil & Gas Asset Clearinghouse (the "Clearinghouse") in Houston. The Louisiana Assets were subject to a consent to assign provision in a sublease granted by Exxon Mobil Corporation ("Exxon") to the defendant, PetroQuest Energy, LLC ("PetroQuest").¹³⁴

In connection with the auction, PetroQuest distributed a data sheet which noted that the Louisiana Assets were "subject to a consent to assign."¹³⁵ Plaintiff, Cedyco Corp. ("Cedyco"), was the successful bidder of the Louisiana Assets with a bid of \$1,000.00. PetroQuest sought Exxon's consent to the assignment Cedyco.¹³⁶ However, because of concerns about Cedyco's credit history and regulatory compliance history, Exxon would only consent if PetroQuest agreed to indemnify Exxon.¹³⁷ PetroQuest notified Clearinghouse that it could not sell the Louisiana Assets to Cedyco because it could not obtain an unqualified consent to the assignment from Exxon.¹³⁸ Almost two years later, PetroQuest sold the same assets for \$125,000.00. Cedyco then sued PetroQuest for breach of contract, specific performance, and conversion.¹³⁹

The district court awarded a summary judgment in favor of Cedyco reasoning that the sale at auction was a final sale.¹⁴⁰ The Fifth Circuit reversed. The Fifth Circuit found that the contract to sell was subject to the suspensive condition of obtaining Exxon's consent. The Fifth Circuit concluded that Exxon's conditional consent did not satisfy the suspensive condition, reasoning:

Nothing in the contract mandated or even suggested that PetroQuest must accept Exxon's condition in order to obtain consent. To hold otherwise would force PetroQuest to accept whatever limited consent Exxon gives.¹⁴¹

¹³¹ Id.
¹³² Id.
¹³³ 497 F.3d 485 (5th Cir. 2007).
¹³⁴ Id.
¹³⁵ Id. at 487.
¹³⁶ Id.
¹³⁷ Id.
¹³⁸ Id.
¹³⁹ Id.
¹⁴⁰ Id. at 487-88.
¹⁴¹ Id. at 490.

Because the condition was not satisfied, PetroQuest had no obligation to conclude the sale.

While *Cedyco Corp. v. PetroQuest* pertains to a consent to assign provision in a Louisiana mineral sublease, the court applied Texas law to determine the meaning of "consent."¹⁴² The case nonetheless provides some guidance with respect to whether potential sublessors or assignors are obligated to obtain consent at all cost.

4. **Potential Consequences When Consent is Not Obtained.**

a. Dissolution of the Lease.

With respect to commercial leases, the Louisiana Supreme Court has upheld the use of lease dissolution as a remedy for beach of an unqualified consent to assign provision.¹⁴³ Similarly, the Louisiana First Circuit Court of Appeal has held dissolution is an available remedy where a consent to assign provision in a mineral lease was breached.¹⁴⁴

Phoenix Association Land Syndicate Inc. v. E. H. Mitchell & Co., L.L.C., involved a mineral lease for mining sand and gravel.¹⁴⁵ The case neither analyzed nor addressed whether consent could be withheld under the provision at issue; rather, the case addressed whether two operating agreements constituted subleases for the purposes of triggering a clause requiring prior written consent of the lessor to sublease.¹⁴⁶ It further addressed the availability of dissolution as a potential remedy for breach.¹⁴⁷

It was undisputed that no consent was sought from or given by the lessor before the operating agreements at issue were granted by the defendant.¹⁴⁸ Thus, the lessor's actions were not at issue. The operating agreements stated that they should not be construed as a lease or sublease; however, the court found that the characterization by the parties to the operating agreements was not controlling.¹⁴⁹ The court reasoned that the characterization of the contract was a matter of law that could not be confessed or admitted by the parties to a contract.¹⁵⁰ Instead, it should be determined by the contract's substance and legal effects—the best evidence of which is "what the parties agreed to do."¹⁵¹

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¹⁴³ Ill. Ctr. Gulf R.R. Co., 368 So. 2d at 1015-16.

- ¹⁴⁵ Id.
- ¹⁴⁶ *Id.* at 610.
- ¹⁴⁷ Id.

¹⁴² *Id.* at 489-90.

¹⁴⁴ Phoenix Ass'n Land Syndicate Inc., 970 So. 2d 605, 616 (La. Ct. App. 1st 2007).

¹⁴⁸ *Id.* at 612.

¹⁴⁹ *Id.* at 613.

¹⁵⁰ *Id.* at 613-14.

¹⁵¹ *Id.* at 614.

The court noted that "[a] lease is a contract by which [a] party gives to another the enjoyment of the thing [leased] for a fixed price."¹⁵² Both operators were granted the right to use roads, bring outside materials to the leased premises, use existing utilities on the leased premises, and have exclusive use of the designated mining area.¹⁵³ And under both agreements, the operators became the owners of the gravel, soil, and minerals produced.¹⁵⁴ The court reasoned that granting these rights constituted a dismemberment of the ownership of the land subject to the operating agreements, resulting in a sublease or a personal servitude.¹⁵⁵ Thus, it affirmed the trial court's ruling on this issue.

The court also concluded that by executing the operating agreements, the putative sublessor "caused a 'subletting-without-consent' breach" of the mineral lease.¹⁵⁶ The court noted that the distinction between active and passive breaches is preserved in the Mineral Code and found that the failure to obtain the lessor's consent was an active breach of the lease,¹⁵⁷ and therefore, there was no error in awarding the remedy of dissolution.¹⁵⁸

Phoenix Association Land Syndicate Inc. is a cautionary tale for lessees. The case was decided by summary judgment, which indicates that the harsh remedy of dissolution was granted as a matter of law. But there may have been additional factors motivating the decision. While the above synopsis focuses on the limited facts germane to the issue of consent, the opinion also notes that the putative sublessor had filed an unsuccessful petition for bankruptcy, failed to pay royalties in some instances, underpaid royalties in others, took soil without remuneration to the lessor, allowed other third parties on the lease premises to mine without written permission of the lessor, and continued operations before negotiating a necessary lease extension. That said, lessees and their potential sublessees and assignees should be mindful that the harsh remedy of dissolution is a potential remedy in the event of a breach.¹⁵⁹

¹⁵⁴ Id.

¹⁵⁹ Another case that bears mentioning is *Amoco Prod. Comp. v. Texas Meridian Res. Expl., Inc.*, 180 F.3d 664 (5th Cir. 1999). The case involved a joint exploration agreement between the plaintiff, Amoco Production Company ("Amoco"), and defendant, Texas Meridian Resources Exploration, Inc. ("Texas Meridian"), and a lease covering land owned by Amoco. *Id.* at 666-67. The joint exploration agreement included the requirement that Texas Meridian obtain Amoco's consent to operate in a restricted area. *Id.* at 667. Texas Meridian sought consent to drill a well in the restricted area, which was denied by Amoco. *Id.* at 667-68. Texas Meridian nonetheless proceeded to drill without Amoco's consent, and Amoco filed suit. *Id.* at 668. The district court found that the agreements gave Amoco the unconditional right to deny access to the restricted area, and rendered judgment cancelling the entire lease pursuant to a provision in the agreements, awarded Amoco \$10,561,800 in damages, attorney fees pursuant to article 207 of the Mineral Code, and interest as of the date of judicial demand. *Id.* However, it offset Amoco's damages by \$2,817,905.57 for the cost of improvements and labor incurred by Texas Meridian. *Id.* The Fifth Circuit affirmed except with respect to the award of interest, which was reversed. *Id.* at 674.

¹⁵² *Id*.

¹⁵³ *Id.* at 615.

¹⁵⁵ *Id.* at 616.

¹⁵⁶ *Id.* at 613.

¹⁵⁷ Id.

¹⁵⁸ *Id.* at 616.

b. The Assignment Is Ineffective.

An often overlooked holding in the Louisiana First Circuit Court of Appeal's opinion in *Terrebonne Parish School Board v. Castex Energy Inc.*,¹⁶⁰ is that when a mineral lease is subject to a consent to assign provision the subsequent assignment of such lease without consent renders the assignment ineffective.¹⁶¹ The case involved a consent to assign provision in a mineral lease granted by the Terrebonne Parish School Board (the "School Board") over Section 16 lands.¹⁶² The provision stated:

It is further agreed and understood that the rights of Lessee may be assigned or transferred in whole or in part but no transfer, whether in whole or part, of the herein leased property shall be valid unless such transfer or assignment be approved by the Lessor.¹⁶³

The mineral lease was transferred through a series of approved assignments to Samson Hydrocarbon Company and Samson Resources Company ("Samson").¹⁶⁴ Thereafter, Samson assigned its interest to Castex Energy, Inc. ("Castex") but did not obtain the School Board's approval of the assignment.¹⁶⁵

The School Board filed suit against Sampson and others claiming that under Mineral Code article 122 the mineral lease included an implied obligation to restore the lease premises.¹⁶⁶ Sampson filed an incidental demand against Castex, contending that Castex was required to indemnify Sampson in the event of an adverse judgment.¹⁶⁷ The trial court denied Sampson's claim for indemnity because the conveyance to Castex was not approved by the School Board as required by the lease.¹⁶⁸ The First Circuit Court of Appeal affirmed.¹⁶⁹

The court of appeal reasoned that the assignment to Castex was subject to an implied suspensive condition that Samson would obtain the School Board's approval of the assignment.¹⁷⁰

- 162 *Id.* at 525.
- 163 *Id.* at 538.
- 164 *Id.* at 526.
- 165 *Id.* at 526.
- ¹⁶⁶ *Id.* at 527-29.

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¹⁶⁰ 878 So. 2d 522, 539 (La. Ct. App. 1st 2004).

¹⁶¹ The issue of the effect of the failure to obtain lessor consent is overshadowed by the central issue in the case whether Mineral Code article 122 required restoration of the leased premises in the absence of express lease language. ¹⁶¹ *Id.* at 525.

 $^{^{167}}$ *Id.* at 525.

¹⁶⁸ *Id.* at 527. The School Board also sued Castex for a restoration of the land subject to the lease. The trial court dismissed the School Board's claims against Castex on the same basis as those of Samson. The School Board did not appeal this decision. *Id.* at 527, n. 5.

 $^{1^{\}hat{69}}$ *Id*. at 539.

¹⁷⁰ *Id.* at 538-39.

The court found that because approval was not obtained, the condition never came to fruition, and the assignment itself never became effective.¹⁷¹ Thus, it held that the assignment was "regarded as not having existed," and therefore, Samson had no claim for indemnity related to operations pursuant to that lease.¹⁷²

On the principle demand, the trial court rendered judgment for the School Board against the remaining defendants, including Samson. That judgment was vacated by the Louisiana Supreme Court,¹⁷³ which then concluded that there was no need to address whether Samson's assignment to Castex was effective.¹⁷⁴ The First Circuit's holding regarding the effect of consent to assign provisions therefore remains unchallenged.

An interesting consequence of the First Circuit's holding is that the lessor also has no claim for breach of the lease against the putative transferee in the event no consent is given. Depending on the circumstances, the lessor may have other claims against a putative transferee who commences operations in the absence of a valid sublease or assignment, possibly arising out of tort or other theories of law.

C. The Special Problem of State Leases.

Mineral leases granted by the State of Louisiana are limited by a statutory consent to assign provision.¹⁷⁵ Under the Louisiana Revised Statutes, express approval of the Louisiana State Mineral Board (the "Board") must be sought and obtained in order to transfer a lease covering mineral rights owned by the state.¹⁷⁶ Without such approval, the transfer is invalid.¹⁷⁷ Prospective lease holders must be registered with the Office of Mineral Resources.¹⁷⁸ The failure to obtain the Board's approval within sixty days of a transfer, subjects the transferor to a penalty of one hundred dollars per day until approval is obtained, up to a maximum of one thousand dollars.¹⁷⁹ Though this penalty may be waived by the Board,¹⁸⁰ it is not advisable to rely on this provision.

In addition to the economic risk in failing to obtain the Board's consent, other consequences affecting both the assignor and assignee may follow. In *Transworld Drilling Co. v.*

¹⁷¹ *Id.* at 538.

¹⁷² *Id*.

¹⁷³ 893 So. 2d 789, 820 (La. 2005).

¹⁷⁴ Id.

¹⁷⁵ La. Rev. Stat. Ann § 30:128 (A) (West 2007).

¹⁷⁶ *Id.* However, this restriction does not apply to mortgages or other security interests, nor does it apply to transfers of overriding royalties, production payments, net profit interests, or other similar interests. La. Rev. Stat. Ann § 30:128 (C) (West 2007).

¹⁷⁷ La. Rev. Stat. Ann § 30:128 (A) (West 2007).

¹⁷⁸ Id.

¹⁷⁹ La. Rev. Stat. Ann § 30:128 (B)(1) (West 2007).

¹⁸⁰ Id.
Texas General Petroleum Corp., the Fourth Circuit Court of Appeal addressed whether an assignment of a state lease was effective prior to obtaining the approval of the Board for the purpose of determining whether the assignee was bound by a notice of *lis pendens* filed prior to the Board's approval but after the assignment.¹⁸¹ The court refused to recognize the assignment as conveying any rights to the lease until the date on which the Board approved the assignment, holding that the "assignment did not come into being until September when the Mineral Board approved the assignment pursuant to R.S. 30:128. Strata [the assignee] was a stranger and third party [to the lease] when the suit was filed."¹⁸² Thus, the assignee took the State lease subject to a lien filed, prior to the Board's approval, but after the date on which the actual assignment occurred.¹⁸³ The court found that any loss suffered was the result of "premature payment of consideration before the assignment was made valid."¹⁸⁴ Accordingly, the court afforded the assignee no relief.

IV. Conclusion.

Rather than blind reliance on the provisions in the many lease forms commonly used throughout the industry, it is apparent from the forgoing that a careful assessment of the form's language is essential. Though forms provide the practitioner with a sound starting point and provide the client with a degree of security by weighing the known risks, forms should be reviewed with an eye towards obviating some of the known pitfalls. Essential to this assessment is the client's reasonable goals. A lessor will want to incorporate broad language to include any type of assignment within its purview and seek to include language that makes obvious that consent is in its sole discretion. Conversely, lessee may desire to remove a consent provision in its entirety or may choose to make other concessions to lessen the concerns of the lessor. If a provision is included both the lessor and lessee will generally benefit when a consent to assign provision: (1) defines types of transfers to which it does and does not apply, (2) states the reasons for which consent may be withheld, and (3) states the remedies available in the event of a breach by either the lessor or lessee. With careful drafting and an inventive mind, oil and gas lawyers may pilot their clients through the hazards of such restriction on assignment.

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¹⁸⁴ Id.

¹⁸¹ Transworld Drilling Co. v. Texas Gen. Petroleum Corp., 480 So. 2d 323 (La. Ct. App. 4th 1985).

¹⁸² *Id.* at 325.

¹⁸³ Id.



